UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re COMPTEL, *et al.*

Petitioners.

Docket No. 11-1262

PETITION FOR WRIT OF MANDAMUS

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COMPTEL, the Ad Hoc Telecommunications Users Committee, BT Americas Inc., Computer & Communications Industry Association, Inc., Media Access Project, New America Foundation, Public Knowledge, Rural Cellular Association, and tw telecom inc. (collectively, "Petitioners") seek a writ of mandamus requiring the Federal Communications Commission ("FCC") to conclude a long overdue rulemaking on special access pricing reform.

Special access services are dedicated broadband services that connect locations within a local exchange area. The services are a critical part of our national telecommunications infrastructure and, in most locations, are owned and controlled exclusively by a single entity – one of the three dominant incumbent local exchange carriers ("ILECs"), AT&T, Verizon or CenturyLink/Qwest. Because this control grew out of the Bell monopoly, the FCC has traditionally regulated the price at which the ILECs sell special access. But in 1999 – based on erroneous predictions that the large ILECs' bottleneck control over special access would erode – the FCC essentially deregulated the special access market, allowing dominant carriers to charge inflated monopoly prices and impose anticompetitive terms and conditions on purchasers of special access. Without access to these bottleneck services on just and reasonable terms, businesses throughout the economy are harmed, competitive local exchange carriers ("CLECs") cannot

compete effectively and will be relegated to the role of fringe competitors, and other entities that purchase special access are forced to pay inflated prices.

The FCC has known for nearly a decade that the "predictions" underlying its 1999 pricing regime for special access are fundamentally flawed and have resulted in unreasonably high rates. The large ILECs have reaped billions of dollars in supra-competitive profits; competition for vital services has been impeded; hundreds of thousands of jobs have been lost; and consumers have ultimately borne the brunt of these harms in the form of higher prices and lesser services.

In response to a similar petition filed by then-CLEC AT&T in 2005, the FCC opened a rulemaking, WC Docket 05-25, *Special Access Rates for Price Cap Local Exchange Carriers* ("Special Access Docket"), and assured the Court and industry that the agency would not only act expeditiously on special access pricing reform, but would also consider interim measures to address this urgent problem. Despite these promises, the FCC still has not acted. The agency has instead inexplicably dragged its feet for another half-decade, with no end in sight.

The FCC has failed to perform its core function of ensuring that the rules governing special access result in just and reasonable rates, terms and conditions, notwithstanding increasing evidence of the severe harms to competition, the national economy, and consumers resulting from the agency's inaction. The agency's continued delay has surpassed unreasonable and, in the words of this

Court, is now "so egregious as to warrant mandamus." *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 72 (D.C. Cir. 1984) ("*TRAC*").

Petitioners hereby petition this Court for a writ of mandamus to compel the FCC to conclude its rulemaking and issue rules within six months, pursuant to its statutory duty under the Communications Act of 1934 to ensure services are provided at just and reasonable rates, terms and conditions.

I. JURISDICTION

This Court has jurisdiction over this petition under the Hobbs Act, 28 U.S.C. § 2342, authorizing appellate judicial review of agency action; the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, which authorizes the Court to compel administrative agencies to act when action that would be reviewable has been unreasonably delayed; the All Writs Act, 28 U.S.C. § 1651, authorizing the Court to issue all writs necessary or appropriate in aid of its jurisdiction; and Federal Rule of Appellate Procedure 21, providing for writs of mandamus.

II. ISSUE PRESENTED

Whether a writ of mandamus should issue requiring the FCC to conclude its rulemaking in the Special Access Docket within six months, given the agency's unreasonable delay in concluding the proceeding.

III. RELIEF REQUESTED

Petitioners respectfully request that this Court grant the petition for a writ of mandamus requiring the FCC to issue within six months an appealable order in its

rulemaking proceeding, the Special Access Docket. Due to the dire need for expedited action on the petition, and based on the directive that mandamus petitions "must be given preference over ordinary civil cases," Fed. R. App. P. 21(b)(6), Petitioners respectfully request a prompt ruling by the special panel. In the event the Court refers the matter to a merits panel, Petitioners respectfully request the immediate assignment of the petition to the same merits panel that considered the AT&T Petition in 2005, comprised of Judges Ginsburg, Sentelle, and Randolph. Finally, Petitioners respectfully request that the Court order Respondent to answer the petition within thirty days and allow Petitioners a fifteen-day period to reply.

IV. FACTUAL BACKGROUND

A. Special Access Services and the Special Access Market

Special access services are integral to the U.S. economy. They are dedicated transmission links that connect consumers and businesses to the nation's voice and data networks. In most locations, special access services are available exclusively from a single ILEC. Special access customers include not only wireless providers, long distance carriers, and CLECs, but also consumers and businesses in almost every segment of the economy, including financial services, manufacturing, retail, hospitals, universities, and governments. As one industry observer has aptly described it, "[s]pecial access is to the information economy what highways and

other transportation infrastructure are to manufacturing industries . . . ." Lee L. Selwyn et al., Economics and Technology, Inc., *Special Access Overpricing and the US Economy* at ii (Aug. 2007) ("ETI Report").

In recent proceedings, the FCC and various stakeholders have acknowledged the increasingly vital importance of special access services to a variety of consumers. *See* FCC, *Connecting America: National Broadband Plan* at 48, 143 (2010) ("*National Broadband Plan*") (Special access "encompass[es] a broad array" of services, is "used by businesses and competitive providers," "play[s] a significant role in the availability and pricing of broadband service," provides "critical inputs" for rural broadband, including connectivity for wireless towers to the network for hospitals and health centers, and sometimes as the critical link "between a small town and the nearest Internet point of presence."); *see also* Comments of Sprint Nextel Corp., WC Docket No. 05-25 at i (Jan. 19, 2010) (Special access "is vitally important to virtually every form of telecommunications-based service [and] is used every time a consumer sends an email, surfs the Web, swipes a credit card, uses an automated teller machine ('ATM') or places a wireless or long distance call."). In short, special access is the backbone of our national telecommunications infrastructure. *See FCC Process Reform: Hearing Before the Subcomm. on Commc'ns and Tech. of the H. Comm. on Energy and Commerce*, 112th Cong. 39 (May 13, 2011) ("May 13, 2011

Hearing Tr.") (statement of Rep. Michael Doyle) ("I've always thought that name 'special access' is a misnomer. It should be called 'critical access.'").

B. The FCC's Protracted Failure To Act On Special Access

When faced with a similar mandamus petition over a half-decade ago, the FCC readily conceded that its pricing regime for special access required prompt agency attention. *See Special Access Rates 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*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994, ¶¶ 3, 22 (2005) ("*Special Access NPRM*") (explaining that special access warrants extraordinary treatment by the FCC because of its importance); *see also National Broadband Plan* at 43, 48 (Recommendation 4.8), 143, 148-49 (Recommendation 8.8) (identifying special access as a critical input in need of agency attention). Yet, despite acknowledging that special access warrants extraordinary treatment, the FCC has refused to address the issue for nearly a decade.

1. History of special access rate regulation

A brief history of special access regulation demonstrates the egregiousness and severity of the FCC's inaction. Originally interstate access services, including special access, were governed by "rate-of-return" regulation. *Access Charge Reform*, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd. 12962,

¶ 16 n.15 (2000) ("*CALLS Order*"), *aff'd in part, rev'd in part, and remanded in part, Tex. Office of Public Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001). These regulations limited the amount of profit a carrier could earn on special access and other services and calculated rates based on a carrier's projected costs and demand. *Special Access NPRM* ¶¶ 9, 11. This pricing scheme was criticized by some for removing the incentive to lower costs and increase efficiency because the rate calculation was based directly on the carrier's costs in providing the services. *Id.* ¶¶ 9-10.

To promote efficiency, the FCC replaced the rate-of-return system in 1991with "price cap" regulation, a regime that diminishes the harmful incentives created by rate-of-return regulation but that does not limit the level of profits an ILEC can earn. *Id.* ¶¶ 10-11. The agency created price cap "baskets" for certain groups of interstate access services, including one for special access. These regulations were meant to "act as a transitional regulatory scheme until the advent of actual competition makes price cap regulation unnecessary." *Id.* ¶ 11.

After enactment of the Telecommunications Act of 1996, the FCC determined that further special access reform was needed to "advance the pro-competitive, de-regulatory national policies embodied" in the Act. *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶¶ 1-4, 24-26 (1999) ("*Pricing Flexibility Order*"). In August

1999, the FCC issued a *Pricing Flexibility Order*, which established the special access regulatory regime still in effect today. The *Pricing Flexibility Order* was intended "to provide regulatory relief for special access services coincident with the development of competition for these services." *See Special Access NPRM* ¶ 18. The new pricing rules essentially deregulated special access by granting ILECs immediate pricing flexibility for some services. They also provided for even greater future deregulation in areas that became competitive, based on certain "triggers" that were supposed to serve as a proxy for competition. *Id.*

In promulgating these new rules, the FCC relied on its predictive judgment that ILEC special access offerings would be subject to effective competition in the metropolitan statistical areas ("MSAs") in which the "triggers" were met. *Id.* ¶¶ 4-5. The FCC mistakenly believed that "the triggers would accurately predict the existence of competitive pressures that would discipline interstate special access rates." *Id.* ¶ 18. However, as it turned out, the "triggers" were easily satisfied in most MSAs where there were no effective competitors for the services. Thus, the effect of the *Pricing Flexibility Order* was special access rate deregulation without the requisite competition.

In addition to the deregulatory measures in the *Pricing Flexibility Order*, the FCC further revised its 1991 price cap regulations in May 2000 by adopting a five-year "CALLS Plan" ("Plan"). The Plan was meant as an interim regime to phase

out certain implicit subsidies and move towards a rate-setting regime based on the market rather than regulation. *See id.* ¶¶ 14-15. The FCC predicted – again wrongly – that this change would aid the growth of competition to replace price cap regulation by the time the Plan expired.

The Plan was designed to sunset on June 30, 2005, after which the FCC said it would "re-examine the issue to determine whether competition has emerged." *Calls Order* ¶ 166. In early 2005, as the Plan was about to expire, the FCC promised to adopt another interim order to ensure just and reasonable rates while the agency considered the *Special Access NPRM*, described below. *Special Access NPRM* ¶ 131. The FCC never issued an interim order.

2. AT&T's rulemaking and mandamus petitions, and the resulting *Special Access NPRM*

On October 15, 2002, AT&T filed a petition for rulemaking asking the FCC to replace its special access pricing scheme on an expedited basis because the FCC's predictive judgment in the *Pricing Flexibility Order* had proven to be wrong. *See AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Petition for Rulemaking (Oct. 15, 2002). Competition had not developed in the way the FCC foresaw. To the contrary, ILEC special access prices had *increased* in MSAs in which the price cap regulation had been removed by operation of the "triggers." The rates had become so out of balance that

AT&T's petition also requested immediate interim rate relief during the pendency of the rulemaking.

In response, the FCC opened a proceeding and invited comment. *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, 17 FCC Rcd. 21530 (2002). The comment period closed in December 2002. The FCC took no further action on the petition.[1]

On November 5, 2003, almost a year after the comment deadline, AT&T petitioned this Court for a writ of mandamus (the "AT&T Petition"). *See In re AT&T Corp.*, No. 03-1397. The Court ultimately referred the petition to a merits panel. Prompted by the Court's reaction, the FCC represented that it was "moving expeditiously" and planned to act "in the near future." FCC Merits Br. 3, 13, 15, No. 03-1397, 2004 WL 1895955 (D.C. Cir. July 1, 2004) ("FCC Merits Brief"). Based on these representations, the Court held the matter in abeyance in October 2004, but required the FCC to provide status reports on December 1, 2004 and February 1, 2005.

In January 2005, the FCC issued the *Special Access NPRM*. The FCC again recognized the critical need for special access pricing reform, noting that individual consideration of the special access "basket" was extraordinary:

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[1] The AT&T rulemaking proceeding remains open today – nearly a decade later.

> Although we typically do not examine a single interstate access charges basket (*e.g.*, special access) separate from the other baskets (*e.g.*, common line, switched access, transport), we find that the increased importance of special access services relative to other access services warrants the initiation of a rulemaking proceeding specific to interstate special access charges.

Special Access NPRM ¶ 3. The FCC further noted that its request for comments was due to the "importance of special access services to carriers and customers alike . . . ." *Id.* ¶ 22. Indeed, the issue was so important that the FCC not only carved out special access for exclusive consideration, but acknowledged the need for *immediate* interim relief, promising to "adopt[] an order prior to July 1, 2005 that will establish an interim plan to ensure special access price cap rates remain just and reasonable while the [FCC] considers the record in this proceeding." *Id.* ¶ 131.

Based on these representations, this Court dismissed the AT&T Petition as moot. *See In re AT&T Corp.*, No. 03-1397, 2005 U.S. App. LEXIS 1871, at *1 (D.C. Cir. Feb. 4, 2005) (basing dismissal on the FCC's status report and the notice of proposed rulemaking released on January 31, 2005, among other factors.).

3. Continuing FCC inaction

Despite the FCC's promises to this Court, the *Special Access NPRM* has yet to be concluded and no interim relief has been granted after yet another half-decade. Since 2005, the FCC has instead only published intermittent notices and

requests for information in the Special Access Docket. None has resulted in any real progress. One FCC Commissioner has described the process as resembling the movie *Groundhog Day*, where a character wakes up each morning only to find that he must re-live the same year's Groundhog Day over and over. May 13, 2011 Hearing Tr. at 41 (answer of FCC Comm'r Robert M. McDowell) ("So I've been at the commission almost five years, and it's sort of like Groundhog Day on special access. We're coming up actually on the fourth anniversary of Congressman Markey's letter to the commission insisting that we have some resolution by September of 2007. It's now 2011.").

The first of the FCC's intermittent actions was a July 2007 Public Notice inviting parties to "refresh the record" in the Special Access Docket, based on "a number of developments in the industry." *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, 22 FCC Rcd. 13352, 13352-53 (2007). Over two years later, in November 2009, the FCC sought further comment on the appropriate analytical framework necessary to resolve the issues raised over four years earlier by the original *Special Access NPRM*. *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, 24 FCC Rcd. 13638 (2009). The FCC then convened a July 2010 economist roundtable, which included representatives of ILECs and special access users, to "debate" the analytical framework and "discuss" the types of data that the

agency should collect to evaluate the market. *Wireline Competition Bureau Announces July 19, 2010 Staff Workshop to Discuss the Analytical Framework for Assessing the Effectiveness of the Existing Special Access Rules*, 25 FCC Rcd. 8458, 8458 (2010).

And, in October 2010, the FCC issued a *voluntary* data request "to assist [it] in evaluating the various issues that have been raised in the [2005] *Special Access NPRM*." *Data Requested in Special Access NPRM*, 25 FCC Rcd. 15146, 15146 (2010). This Public Notice stated that the FCC "has *yet* to adopt an analytical framework" and "plans to ask for additional voluntary submissions of data in a *second* public notice." *Id.* at 15146-47 (emphasis added).

In other words, the FCC took over four years after the *Special Access NPRM* was issued to begin "debating" how it should analyze data; took almost another year to request additional data; and plans to delay the rulemaking further for at least one more round of voluntary data submissions that has yet to be scheduled. In the meantime, the FCC, by its own admission, has not even decided how to analyze the data once collected. Thus, while acknowledging that the need for special access pricing reform is urgent and warrants extraordinary agency attention, the FCC has repeatedly punted the issue rather than deal with the problem.

C. The Severe Adverse Harms Caused By The FCC's Inaction

Consumers and competitive providers are enduring severe harms resulting from the FCC's failure to address special access. The FCC has known for nearly a decade that its predictions in the *Pricing Flexibility Order* were wrong; yet, despite repeated promises, the agency has done nothing to ensure just and reasonable rates, terms and conditions – even on an interim basis – for these services.

A 2006 Government Accountability Office report confirmed that prices for special access services in MSAs where the "triggers" were satisfied were, on average, *higher* – not lower (as the FCC had wrongly predicted) – than prices in other markets. GAO, *Telecommunications: FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80 (Nov. 29, 2006) ("Nov. 2006 GAO Report"). A similar report on the special access market by the National Regulatory Research Institute found:

> almost no evidence of the validity of the FCC's current policy equating special access competition with the presence of collocation in ILEC central offices. Market concentration for channel terminations remains high in all areas, regardless of pricing flexibility. This suggests that markets are not conforming to the FCC's predictions. The FCC collocation proxy consistently overestimates the competitiveness of the DS-1 and DS-3 channel termination markets.

Peter Bluhm & Robert Loube, *Competitive Issues in Special Access Markets* at iv, National Regulatory Research Institute at iv (Jan. 21, 2009) ("NRRI Report").

And just two weeks ago, on July 1, 2011, Verizon substantially increased its special access rates in MSAs where the FCC has granted pricing flexibility. *See, e.g.*, Letter from Frederick Moacdieh, Executive Director – Federal Regulatory Affairs, Verizon Tel. Cos., to Marlene H. Dortch, Secretary, FCC, Transmittal No. 1152 (filed July 1, 2011), Attachment, Revised Tariff Pages for Tariff FCC No. 1, §§ 7.5.9(A)-(B) & 7.5.16(A)-(D) (effective July 16, 2011) (increasing monthly rates for DS-1 and DS-3 special access services in 26 MSAs by 6 percent).

Given the critical role special access plays in our economy, it is no surprise that the FCC's failure to provide relief on the rates, terms and conditions of special access services is significantly harming the economy. These harms are at least three-fold.

First, severe economic harm has resulted from higher prices for consumers of special access services. This harm injures the public, which ultimately bears the costs of these higher prices.

Second, the high price of special access services has retarded innovation and competition. Because CLECs and wireless carriers are forced to purchase special access services from large ILECs at artificially inflated (*i.e.*, monopolistic) prices, they have fewer resources to invest in new service offerings, technological innovations or the build-out of new infrastructure. Such investments are critical to

fostering competition, but are impossible under the FCC's flawed special access pricing scheme.

Third, the *de facto* monopoly on special access enjoyed by the large ILECs breeds exclusionary non-price conduct. Purchasers of special access services through large ILECs are inhibited from switching services to competitors by severe terms and conditions in their service contracts limiting the ability to choose another provider. Some of these conditions, often tied to seductive discounts, include revenue guarantees, prohibitions on shifting business to non-incumbent providers, and harsh termination penalties. These terms and conditions leave most purchasers no option but to remain with the large ILEC instead of doing business with a competitor, "even if the competitor is less expensive." Nov. 2006 GAO Report at 30, Table 4 (cataloging examples of contracts with these provisions).

The harms caused by the FCC's failure to address this critical issue have been quantified over the years and are staggering by any measure. A 2003 study, commissioned by AT&T before its acquisition by the ILEC SBC, found that special access reform would increase national output by $11.6 billion and create 64,000 new jobs. Stephen E. Siwek, *Economic Benefits of Special Access Price Reductions* at 9 (Mar. 2011) ("Siwek Study") (attached to Letter from Daniel R. Hesse, Chief Executive Officer, Sprint to The Honorable Julius Genachowski, Chairman, FCC, WC Docket No. 05-25 (Mar. 15, 2011)). By 2007, the adverse

effects of artificially-inflated special access prices were even more severe, depriving the U.S. economy of $17.2 billion in GDP and 95,000 jobs. ETI Report at iii. A more recent study completed by Economists Incorporated in March of this year found that special access pricing reform could increase national output by as much as $37.7 billion, and – using conservative estimates – generate a $4.4-$4.8 billion increase in employee earnings, between 94,000 and 101,000 additional jobs, and an increase in value added to the U.S. economy of between $11.8-$12.4 billion. Siwek Study at 3-4. And these harms will only worsen as the demand for high capacity broadband lines continues to increase, largely reflecting the vast growth of Internet and data traffic across the economy.

The FCC knows that these harms are occurring and that special access requires extraordinary attention. Yet, the FCC continues to drag its feet with no plan or timeframe to end this federal agency version of *Groundhog Day*.

V. ARGUMENT

A. Summary of Argument

This Court is authorized to issue a writ of mandamus where, as here, an agency has unreasonably failed to act. By refusing to address the longstanding and well-known flaws in the special access pricing rules, the FCC has abdicated its statutory mandate to ensure that these services are provided on just and reasonable rates, terms and conditions, as well as its "correlative duty to evaluate its policies

over time to ascertain whether they work . . . ." *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992).

The record in the Special Access Docket – nearly a decade in the making – is replete with statistical and anecdotal evidence of the harms caused by the FCC's refusal to act. And the agency itself has acknowledged that this problem warrants extraordinary action.

Even after being prodded by the Court in 2004, in connection with the AT&T Petition, and despite representing that it would to take expedited steps to address this problem, the FCC has inexplicably allowed another six years to pass without providing even an ounce of interim relief. After nearly a full decade of foot-dragging, "enough is enough." *See In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992). The special access problem indeed requires extraordinary action, but it is now clear that this action should and must be taken by the Court if it is ever to happen. Accordingly, the Court should grant Petitioners' mandamus and order the FCC to act within six months.

B. Reasons Why A Writ Should Issue

A writ of mandamus is "an extraordinary remedy reserved for extraordinary circumstances." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004). "An administrative agency's unreasonable delay presents such a circumstance because it signals the breakdown of regulatory processes." *Id.*

(internal quotations omitted). Courts will, therefore, "interfere with the normal progression of agency proceedings to correct transparent violations of a clear duty to act." *Id.* (internal quotations omitted). In granting a mandamus based upon unreasonable delay in agency action, the Court need only determine that "the agency has a duty to act and that it has 'unreasonably delayed' in discharging that duty." *Id.*; *see also* 5 U.S.C. § 706(1) ("[T]he reviewing court shall . . . compel agency action unlawfully withheld or unreasonable delayed . . . .").

1. Ensuring that special access services are provided on just and reasonable rates, terms and conditions is a core function of the FCC.

The FCC has a statutory mandate to ensure that rates, terms and conditions of special access and other telecommunications services are "just and reasonable." 47 U.S.C. § 201(b). Inherent in this mandate is the duty to evaluate the correctness of the agency's policies and to take timely action to promulgate new rules when warranted. This is especially true where, as here, policies are premised on predictive judgments. In such cases, the agency has a duty to determine "whether [its policies] actually produce the benefits the Commission originally predicted they would." *Bechtel*, 957 F.2d at 881.

In response to the AT&T Petition, the FCC embraced these duties, representing to the Court and others that the agency was "committed to re-examin[ing] periodically rules that were adopted on the basis of predictive

judgments to evaluate whether those judgments are, in fact, corroborated by marketplace developments." *Special Access NPRM* ¶ 5. After the Court dismissed the AT&T Petition as moot based on these representations, the FCC quickly forgot them and, as shown, has refused to take any meaningful action to restore just and reasonable rates, terms and conditions for special access services.

2. The FCC's failure to complete its special access rulemaking has surpassed unreasonable and is plainly egregious.

When considering claims of unreasonable delay, courts employ a "rule of reason" to evaluate the length of administrative proceedings. *TRAC*, 750 F.2d at 80; *PEPCO v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980). The standard for what constitutes unreasonable delay warranting a writ of mandamus is "hardly ironclad"; even so, this Court has identified factors that may be used for guidance, including: whether the time the agency is taking to make the decision comports with the "rule of reason," the effect of expediting delayed action on agency activities of a higher or competing priority, and the nature and extent of the interests prejudiced by delay. *TRAC*, 750 F.2d at 80. Based on these factors, the Court has observed that a "reasonable time for an agency decision could encompass '*months, occasionally a year or two, but not several years or a decade.*'" *In re Am. Rivers*, 372 F.2d at 419 (emphasis added) (quoting *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) (quoting *MCI*, 627 F.2d at 340)); *see also Cmty. Nutrition Inst. v.*

FDA, 773 F.2d 1356, 1361 (D.C. Cir. 1985); *In re Int'l Chem. Workers Union*, 958 F.2d at 1150. "The standard of 'just and reasonable' rates is subverted when the [agency] delay continues for several years." *MCI*, 627 F.2d at 340.

As shown below, the *TRAC* factors weigh heavily in favor of a writ of mandamus here.

a. The FCC's near-decade of inaction surpasses the "rule of reason."

The FCC has proven incapable of resolving the Special Access Docket in a timely manner. Again and again, the FCC has promised action before Congress and this Court, but has consistently failed to deliver.

In response to the AT&T Petition, the FCC represented to this Court in 2004 that "the Commission and its staff have taken steps toward resolving AT&T's requests [and] can be expected to act on the rulemaking petition in the near future." FCC Merits Br. at 3. There has been no resolution.

Then, in its *Special Access NPRM*, the FCC committed to implementing interim relief by July 1, 2005. *Special Access NPRM* ¶ 131. Interim relief was never implemented.

Two years ago, the FCC again made representations to this Court about the importance of the special access issue. *See Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 911 (D.C. Cir. 2009) ("[T]he FCC emphasized that its ongoing Special Access Rulemaking proceeding will address, on an industry-wide basis,

general concerns about discriminatory practices by ILECs with respect to their special access lines. . . . It is true that the proceeding seems to be moving at a slow pace."). Yet, the agency still took no action.

In September 2009, the FCC Commissioners unanimously agreed to support completion of the special access rulemaking *by the end of 2009*. *See Oversight of the Federal Communications Commission: Hearing Before the Subcomm. on Commc'ns, Tech., and the Internet of the H. Comm. on Energy and Commerce*, 111th Cong. 61-62 (Sept. 17, 2009) (answer of FCC Commissioners in response to Rep. Doyle's question as to whether they would agree to support finishing the rulemaking before the end of the year). The rulemaking has not been completed.

When next before Congress in 2010, the FCC Commissioners again committed to act "expeditiously" on special access. *See Oversight of the Federal Communications Commission: The National Broadband Plan: Hearing Before the Subcomm. on Commc'ns, Tech., and the Internet of the H. Comm. on Energy and Commerce*, 111th Cong. 78-79 (Mar. 25, 2010) (answer of FCC Comm'r Baker) ("Special access is . . . something we're taking a look at. . . . [H]opefully, we'll be able to do this expeditiously."); *id.* at 80 (answer of FCC Comm'r Copps) ("Special access – I think it's time to do this."). There has been no expeditious action.

Congress very recently pressed the Commissioners yet again for a date by which the FCC would vote on special access rules, this time pleading with the Commissioners not to proffer yet another vague "as soon as possible." May 13, 2011 Hearing Tr. at 40 (question of Rep. Doyle). In response, the Commissioners repeated their refrain – "we're working very diligently on it." *Id.* (answer of FCC Chairman Genachowski). There is still no apparent work plan to finish it.

By now, these FCC assurances ring hollow. Instead of resolving the issue, special access remains the agency equivalent of *Groundhog Day*. By failing to act meaningfully on special access, despite its numerous representations to Congress and this Court, the FCC has "subverted" its core function of ensuring just and reasonable rates. *See MCI*, 627 F.2d at 340.

In another case involving a similar failure by the FCC to determine just and reasonable rates, this Court concluded that:

> nine years should be enough time for *any* agency to decide almost *any* issue. There comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all - and the result is a denial of justice.

Nader v. FCC, 520 F.2d 182, 206 (D.C. Cir. 1975) (internal quotations omitted) (emphasis added). We have long passed that point here.

The intermittent steps by the FCC to "refresh the docket" and hold "debates" do not excuse the agency's delay. Complete inaction is not required for a

determination that the agency has delayed unreasonably. Rather, the relevant question is whether the FCC "is taking an unreasonably long time to reach a decision." *Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987).

In *PEPCO v. ICC*, for example, this Court found that the Interstate Commerce Commission ("ICC") had unreasonably delayed resolution of a dispute between PEPCO and another party, notwithstanding periodic actions by the agency. The ICC had twice reopened the record upon appeal from its decisions and sought more factual submissions from the parties. *PEPCO*, 702 F.2d at 1028-30. Although the Court acknowledged that the ICC had not been completely inactive, it properly found that the agency's delay in resolving the matter was unreasonable and issued a writ of mandamus compelling prompt action. *Id.* at 1034-35. In so ruling, the Court explained that "excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans." *Id.* at 1034.

Similarly here, the FCC's near decade-long failure to establish just and reasonable pricing rules for special access has significantly harmed the public and competition, and sapped any confidence in the agency's willingness or ability to discharge this core function. The record of agency action surpasses the "rule of reason," *TRAC*, 750 F.2d at 80, and has reached the point of egregiousness.

b. The FCC cannot justify its inaction by claiming special access is too "complex."

In its briefing before this Court seven years ago on AT&T's mandamus petition, the FCC tried to justify its inaction based on the fact that special access is "complex." FCC Merits Br. at 19, 22. But expert federal agencies are not permitted to use a matter's purported complexity to excuse the abrogation of a statutory mandate. *See MCI*, 627 F.2d at 340 ("[T]here must be some reasonably prompt decisionmaking point at which the FCC says: 'To the best of our knowledge and expertise at this time, the rates are just and reasonable.'").

In *MCI Telecommunications Corp. v. FCC*, the FCC permitted tariffs to continue in place four years after determining that they were not properly justified. *Id.* at 326-27. This Court refused to accept the FCC's plea that the matter was complex and required more time to resolve. *Id.* at 345. While acknowledging that the "task is complicated," the Court properly determined that the agency's continuing delay was unreasonable and "the time ha[d] come to bring these proceedings to a close." *Id.*

Rather than address the complexities arising from the special access rules here, the FCC has deferred making any hard choices by continuously punting the issue down the road with intermittent requests for information and debates. Even more so than in *MCI*, the resulting delay has surpassed the "rule of reason."

Judicial intervention is now necessary to bring the special access proceeding to some reasonable close.

Moreover, while complexity is no excuse for unreasonable agency inaction, the record shows that the FCC is fully capable of resolving complex rulemakings in a timely manner. For example, there have been at least two rulemaking proceedings initiated well after the 2005 *Special Access NPRM* that involve similarly complex issues and voluminous filings. Yet, in both instances, the FCC has issued final orders resolving these matters. *See, e.g.*, *Preserving the Open Internet*, GN Docket No. 09-191 (commenced in 2009, order released December 23, 2010); *Implementation of Section 224 of the Act*, WC Docket No. 07-245 (commenced in 2007, final order released April 7, 2011).

One of the matters involved the very complicated and highly contested issue of net neutrality and the extent to which, if at all, broadband Internet access services should be regulated. *Preserving the Open Internet*, GN Docket No. 09-191 (commenced in 2009, order released December 23, 2010). Although over 10,000 comments were filed in response to the FCC's NPRM, the FCC managed to adopt final rules a little over a year after its release. *Id.* The FCC's swift action on net neutrality is even more significant in light of the fact that its authority to regulate broadband Internet access has been contested, whereas it is undisputed that ensuring just and reasonable rates for special access is a core function of the

agency. *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (holding that the FCC could not demonstrate it had the "ancillary" authority to support its attempt to regulate Comcast's Internet service).

The second proceeding involved pole attachment regulation and the FCC's determination of, among other things, the rate an electric utility company may charge telecommunication and cable companies for renting space on a pole owned by the electric utility company. The FCC deemed this issue particularly complex with respect to the application of the just and reasonable rate requirement to ILECs. *Implementation of Section 224 of the Act*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd. 11864, ¶ 143 (2010) ("The issues related to incumbent LEC attachment rates, however, raise complex questions, and although the National Broadband Plan noted the possible effects of these rate disparities, the Plan did not include a recommendation specifically addressing this matter."). Despite the acknowledged complexity evidenced by the docket, which included over 700 filings, the FCC adopted final rules four years after instituting the proceeding. *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 (2011).

Although the special access proceeding may likewise involve complex issues, the FCC has had more than adequate time to resolve the matter and issue an appealable order under any "rule of reason." And having repeatedly represented to

Congress and this Court that it was acting "expeditiously" to bring this important matter to a close, the FCC can no longer be relied on to do so without judicial intervention.

c. A balance of competing priorities and the negative consequences from continuing delay weighs heavily in favor of a writ of mandamus.

Finally, a writ of mandamus compelling prompt resolution of this rulemaking will not have a negative effect on higher or competing priorities at the FCC. *See TRAC*, 750 F.2d at 80 ("[T]he court should consider the effect of expediting delayed action on agency activities of a higher or competing priority."). Because the FCC's core function is to ensure just and reasonable rates, terms and conditions, it is essential that this proceeding be given the highest priority. The FCC itself has acknowledged this fact, but inexplicably ignored its statutory mandate.

Furthermore, any negative consequences of ordering the FCC to act on this rulemaking are greatly outweighed by the importance of the rulemaking and the continuing prejudice and harm resulting from the agency's egregious delay. *See id.* ("[T]he court should also take into account the nature and extent of the interests prejudiced by delay."). As shown above, the FCC's failure to resolve this critical matter has caused irreparable harm to consumers, CLECs, wireless carriers and enterprise customers. *See supra* § IV.C. All the while, large ILECs have

"parlayed the special access market failure into an overcharge-bonanza of $7.4 billion dollars a year." Written Testimony of Gary D. Forsee, Chairman and Chief Executive Officer, Sprint Nextel Corporation, The Digital Future of the United States: Part VI - The Future of Telecommunications Competition: Hearing Before the H. Subcomm. on Telecomms. and the Internet at 12 (Oct. 2, 2007).

In the words of this Court, "enough is enough." *See In re Int'l Chem. Workers Union*, 958 F.2d at 1150. Based on nearly a decade of inaction, it is now clear that the FCC is incapable of timely resolving this critical issue on its own. Having acknowledged that the special access problem warrants extraordinary action, the FCC is in no position to oppose the relief requested in the petition simply to get the agency to do its job.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court issue a writ of mandamus compelling the FCC to conclude its special access proceeding and to issue new rules within six months.

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Dated: July 15, 2011

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of this Court, COMPTEL, the Ad Hoc Telecommunications Users Committee, BT Americas Inc., Computer & Communications Industry Association, Media Access Project, New America Foundation, Public Knowledge, Rural Cellular Association, and tw telecom inc., submit the following corporate disclosure statements:

COMPTEL is the leading national trade association representing competitive communications service providers and their supplier partners. COMPTEL is a not-for-profit corporation and has not issued shares or debt securities to the public. COMPTEL does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Ad Hoc Telecommunications Users Committee is an unincorporated, non-profit association of large business users of communications services. Ad Hoc represents the interests of its members in proceedings before the FCC and the federal courts on issues related to the regulation of interstate telecommunications. Ad Hoc is a "trade association" as defined in Circuit Rule 26.1(b).

BT Americas Inc. is a Delaware corporation and a wholly-owned indirect subsidiary of BT plc, a UK company that serves the communications and managed network needs of customers in the UK and over 170 countries worldwide. BT

Americas serves the US needs of many of BT's enterprise customers as they typically have a significant presence in the USA. BT plc is a publicly traded company, and no publicly held company has a 10% or greater ownership interest in BT plc.

Computer & Communications Industry Association (CCIA) is an international, nonprofit association of computer and communications industry firms, representing a broad cross section of the industry. CCIA is a not-for-profit corporation and has not issued shares or debt securities to the public. CCIA does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Media Access Project has no parent corporations, and no publicly-held company has a 10% or greater ownership in Media Access Project.

New America Foundation (NAF) is a non-profit public policy institute and has no parent corporations, and no publicly-held company has a 10% or greater ownership in NAF.

Public Knowledge has no parent corporations, and no publicly-held company has a 10% or greater ownership in Public Knowledge.

Rural Cellular Association (RCA) is an association representing the interests of nearly 100 rural and regional wireless licensees providing commercial services to subscribers throughout the nation. No RCA carrier member has as

many as 10 million customers, and most of RCA's members serve fewer than 500,000 customers. RCA has no parent company and no publicly held company has a 10% or greater ownership interest in RCA.

tw telecom inc., formerly Time Warner Telecom Inc., through its operating subsidiaries, is a leading provider of managed network solutions to a wide range of business customers throughout the United States. tw telecom is a publicly traded company. tw telecom has no parent entity and no publicly held company has a 10% or greater ownership interest in tw telecom.

RULE 28 CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

This petition for writ of mandamus challenges the FCC's unreasonable failure to complete a rulemaking and so there were no parties below. The parties to the writ in this Court are COMPTEL, the Ad Hoc Telecommunications Users Committee, BT Americas Inc., Computer & Communications Industry Association, Media Access Project, New America Foundation, Public Knowledge, Rural Cellular Association, and tw telecom inc. The petition requests that the Court issue a writ of mandamus compelling the FCC to conclude its special access proceeding and to issue new rules within six months.

(B) Rulings Under Review

The petition challenges the FCC's unreasonable failure to complete the rulemaking in *Special Access Rates 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*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994 (2005).

(C) Related Cases

A similar petition was previously filed by AT&T in 2005 and assigned to a merits panel of this Court, comprised of Judges Ginsburg, Sentelle and Randolph, *see In re AT&T Corp.*, No. 03-1397. The panel declined to issue a writ of

mandamus but imposed reporting obligations on the FCC. To the best of counsel's knowledge, no related cases are pending in any court.

CERTIFICATE OF SERVICE

I, David P. Murray, certify that on this 15th day of July, 2011, I caused two true and correct copies of the (1) Petition for Writ of Mandamus, (2) Corporate Disclosure Statements, and (3) Rule 28 Certificate as to Parties, Rulings, and Related Cases to be served on the Federal Communications Commission by hand delivery and a courtesy copy of each by electronic mail as follows:

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