June 3, 2005

Ex Parte Letter

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: Special Access Rates for Price Cap Local Exchange Carriers, WC Dkt. No. 05-25; July 1, 2005 Annual Access Charge Tariff Filings, WCB/Pricing 05-22

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission’s rules, T-Mobile USA, Inc. (“T-Mobile”) writes to support the letter submitted in the above-captioned proceedings by the eCommerce & Telecommunications User Group and the Telecommunications Committee of the American Petroleum Institute (collectively “eTUG/API”) requesting the adoption of an interim X-factor of 5.3 percent for interstate special access rates to take effect on July 1, 2005. T-Mobile also responds to the letter filed by BellSouth D.C., Inc. (“BellSouth”) opposing the eTUG/API request for interim relief.

The record in this proceeding provides ample evidence that the current interstate special access rates are excessive, and thus supports the interim imposition of a 5.3 percent X-factor effective July 1, 2005. T-Mobile disagrees with BellSouth’s claims that interim relief is inappropriate, and that the Commission should await the outcome of this proceeding before determining the appropriate course of action. As the Commission itself noted in the notice of proposed rulemaking in this proceeding (the “NPRM”), the record contains “substantial evidence suggesting that productivity has increased and continues to increase in the provision of special

1 47 C.F.R. §1.1206.
2 Letter from Brian R. Moir, counsel for eTUG and C. Douglass Jarett, counsel for API, to Marlene H. Dortch, Secretary, FCC (May 10, 2005) (“eTUG/API Ex Parte”).
3 Letter from Bennett L. Ross, General Counsel-D.C., BellSouth, to Marlene H. Dortch, Secretary, FCC (May 27, 2005) (“BellSouth Ex Parte”).
4 BellSouth Ex Parte at 3-5.
access services.” The imposition of an X-factor is therefore appropriate because an X-factor historically has been used precisely to address such productivity increases. In fact, the 5.3 percent X-factor proposed in the NPRM and requested by eTUG/API is a readily supportable interim measure both because it falls within the range of X-factors that were used over the course of the CALLS plan and because it is the last X-factor established by the Commission that was judicially approved. In recognition of this situation, the NPRM specifically requested comment on the interim relief that eTUG/API requests.

Further, as eTUG/API explains, the most recent ARMIS filings demonstrate that the accounting rates of return for interstate special access services for three of the four largest price cap local exchange carriers is in excess of 76%, which is “substantially in excess” of the prescribed 11.25 percent rate of return for rate-of-return local exchange carriers. In light of this compelling record, it is abundantly clear that the current special access rates are not just and reasonable. Accordingly, the Commission is more than justified in adopting the interim relief requested by eTUG/API.

BellSouth also argues incorrectly that the eTUG/API request is procedurally improper. BellSouth claims that granting interim relief effective July 1, 2005 – prior to the completion of the full pleading cycle in this proceeding – would violate the Administrative Procedure Act (“APA”). The APA, however, is by no means as absolute as BellSouth asserts. The Commission has ample authority under Section 553 of the APA, 5 U.S.C. §553, and under its own regulations to issue the requested interim rule prior to the completion of the full pleading cycle and to make that rule effective on July 1.

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6 Id. at ¶11.

7 Id. at ¶15 (setting forth X-factors used over course of CALLS plan), ¶131 (noting that the 5.3 percent productivity factor was upheld by the D.C. Circuit).

8 Id. at ¶131.

9 eTUG/API Ex Parte at 2.

10 NPRM at ¶35.

11 BellSouth Ex Parte at 1-2.

12 In the alternative, if the Commission decides not to grant the requested interim relief, T-Mobile supports eTUG/API’s request to delay the annual access filings pending determination of an appropriate X-factor. eTUG/API Ex Parte at 3.
As a general matter, of course, the APA requires that when the Commission makes a rule, it must: (1) provide notice of the proposed action, (2) provide interested parties “an opportunity to participate in the rule making,” and (3) publish the substantive rule not less than 30 days before its effective date.13 These requirements, however, are subject to certain exceptions that BellSouth completely fails to address. With respect to the notice and comment requirements, the APA expressly allows an agency to modify or eliminate notice-and-comment procedures if it finds that “good cause” exists such that the standard procedures are “impractical, unnecessary, or contrary to the public interest.”14 Similarly, the APA expressly allows an agency to make a new rule effective sooner than 30 days after Federal Register publication upon a finding of “good cause” alone.15

The Commission has satisfied the APA’s first relevant procedural requirement. The Commission provided timely and specific notice of the requested interim relief. No one can dispute that the NPRM presented precisely the interim relief – the imposition of a 5.3 percent X-factor – that eTUG/API has requested.16 The Commission duly published the notice of proposed rulemaking in the Federal Register over six weeks ago.17

As to the APA’s second procedural requirement, interested parties will have had ample “opportunity to participate” in the decision to adopt the needed interim relief. The Commission can evaluate the initial round of comments, due on June 13, 2005, before ruling on the requested interim relief. The NPRM expressly states that the Commission “anticipate[s] adopting an order prior to July 1, 2005 that will establish an interim plan,” so the public has already received notice that the Commission intends to act on this issue prior to the due date for reply comments.18 When coupled with the numerous ex parte filings that have been made in this proceeding on this issue of relief,19 parties will have had plentiful opportunities to meaningfully participate with

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13 5 U.S.C. §553(b) through (d).
16 NPRM at ¶131.
18 NPRM at ¶131.
19 In addition to the eTUG/API Ex Parte, the BellSouth Ex Parte and this filing by T-Mobile, at least three other parties have filed ex parte letters in support of eTUG/API’s request. See Ex Parte letter from Michael H. Pryor, Counsel for Comptel/ALTS, to Marlene H. Dortch, Secretary, FCC (May 13, 2005); Ex Parte Letter from Paul Kouroupas, Vice President & Senior Counsel, Global Crossing, to Marlene H. Dortch, Secretary, FCC (May 24, 2005); and Ex Parte Letter from Robert W. Quinn, AT&T, to Marlene Dortch, Secretary, FCC (May 26, 2005).
respect to this issue. Nothing in the APA requires any specific number of rounds of comment prior to adopting such relief. Although the Commission’s rules generally provide for reply comments, the Commission’s rules also permit it to waive any provision of its rules, including reply comments, for “good cause.” The Commission in the past has exercised this authority to dispense with reply comments and such action has been upheld by the D.C. Circuit.

Finally, with respect to the third relevant APA requirement, today’s excessive special access rates already noted in the record constitute “good cause” for the Commission to waive the requirement that the requested interim rule be published 30 days prior to its effectiveness. In fact, the Commission has exercised this authority to waive the advance publication requirement of the APA in numerous circumstances. Accordingly, the Commission is fully justified in issuing an interim rule after initial comments have been filed (but prior to the completion of the reply round) with an effective date of July 1.

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20 47 C.F.R. §1.415(c).
21 47 C.F.R. §1.3.
22 See Omnipoint Corp. v. Federal Communications Commission, 78 F.3d 620, 629-31 (D.C. Cir. 1996) (“Omnipoint”) (finding that a shortened, single-round pleading cycle of only seven days, without opportunity for reply comments, was sufficient to comply with the APA’s notice-and-comment requirements in order to adopt a rule in light of the need for rapid action).
23 See 47 C.F.R. §1.103(a) (noting that the Commission may designate an effective date that is earlier than the date of public notice of an action); and 47 C.F.R. §1.427(b) (noting specifically that the Commission may, for “good cause,” make a new rule effective within less than 30 days from the time of Federal Register publication).
24 See Omnipoint, 78 F.3d at 630-31 (finding that the Commission’s decision to make a rule effective immediately upon publication was justified under the circumstances); Unbundled Access to Network Elements, WC Dkt. No. 04-313, Order and Notice of Proposed Rulemaking at ¶¶27-28 (rel. Aug. 20, 2004) (noting that Commission rules permit it to render an order immediately effective upon Federal Register publication where good cause warrants, and doing so to establish immediately effective unbundled network element rules on an interim basis); Federal-State Joint Board on Universal Service, Third Order on Reconsideration, 12 FCC Rcd 22801, 22804-05 (1997) (waiving APA’s 30-day requirement “because the rules adopted herein are critical to the expeditious and efficient implementation of the new federal universal service support mechanisms”).

At least one federal appellate court specifically has acknowledged that this “good cause” standard for waiving the 30-day requirement is an even “broader” standard than the standard for waiving notice-and-comment requirements. See United States Steel Corp. v. United State Environmental Protection Agency, 605 F.2d 283, 286, 289-90 (7th Cir. 1979) (finding that EPA had good cause to justify dispensing with prior notice-and-comment procedures, and “unquestionably” good cause to justify dispensing with the advance publication requirement, which is assessed under a broader standard).
Accordingly, the Commission can and should implement the interim relief contemplated in the NPRM and requested by eTUG/API, effective July 1, 2005.

Respectfully submitted,

/s/ Thomas J. Sugrue

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