Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
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

WC Docket No. 05-25
RM-10593

COMMENTS OF THE NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE

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On the Comments:

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Date: June 13, 2005
In the Matter of

Pursuant to the publication in the Federal Register, initial comments were due June 13, 2005 and reply comments are due July 12, 2005.

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I. INTRODUCTION

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") submits these comments in response to the Order and Notice of Proposed Rulemaking ("Order and NPRM") adopted by the Federal Communications Commission ("FCC" or "Commission") on January 19, 2005, and released on January 31, 2005, in the above-captioned proceeding.¹

A. INTEREST OF THE RATEPAYER ADVOCATE IN THE INSTANT PROCEEDING.

1. The Ratepayer Advocate Has a Distinct Interest in this Proceeding.

The Ratepayer Advocate is an independent New Jersey State agency that represents and protects

¹ Pursuant to the publication in the Federal Register, initial comments were due June 13, 2005 and reply comments are due July 12, 2005.
the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Ratepayer Advocate participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to the Ratepayer Advocate’s continued participation and interest in implementation of the Telecommunications Act of 1996. The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will promote efficiency, reduce regulatory delay, and foster productivity and innovation and will “produce a wider selection of services at competitive market-based prices.” The resolution of the complex economic and policy issues that this proceeding embraces directly affects the structure of telecommunications markets, and the prices that consumers pay for basic telecommunications service.

With this Order and NPRM, the Commission seeks to examine the framework under which price cap local exchange carriers (“LECs”) provide interstate special access services after the CALLS plan expires on June 30, 2005. As such, it seeks comments regarding the special access regulatory regime

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3/ N.J.S.A. 48:2-21.16(a)(4) and 48:2-21.16(b)(1) and (3).

4/ In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board On Universal Service, CC Docket Nos. 96-262; 94-1; 99-249; 96-45; Sixth Report and Order in CC Docket Nos. 96-262 and 94-1; Report and Order in CC Docket No. 96-45, released May 31, 2000 (“CALLS Order”).

5/ The Commission has continued the CALLS plan until the Commission adopts a subsequent plan. In the Matter of 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, FCC WC Docket No. 05-25; R-10593, Order and Notice of Proposed Rulemaking, Released January 31, 2005 (“Special Access Order and NPRM” or “Order and NPRM”), at para. 2.
including whether the Commission should maintain, modify, or repeal its current pricing flexibility rules.\(^6\) The Commission observes that special access services have gained in importance relative to other access services to such a degree that a separate examination of a single interstate access charge basket is justified.\(^7\) The Order and NPRM encompasses various issues including, but not limited to “traditional price cap issues” and the current pricing flexibility rules. Competition in access markets, and ultimately, customers will be greatly impacted by the outcome of this proceeding. The Ratepayer Advocate particularly urges the Commission to consider the impact of a new regulatory framework for the regulation of special access services on residential and small business consumers, rates for basic services, rural consumers, and low-volume users.\(^8\)

\[B. \text{ SCOPE OF THE NPRM.}\]

The Order and NPRM seeks comment on numerous issues related to both the price cap regulatory regime and pricing flexibility. Price cap issues for which the Commission seeks comments include such topics as the PCI formula, the productivity or X-factor, the growth or “g” factor, earnings sharing, the low-end adjustment, special access services basket categories and subcategories, and rate reinitialization.\(^9\) The Commission seeks comments with respect to its pricing flexibility rules including comments regarding the assessment of competition in the special access market, the relevant product and geographic markets,

\(^6/\) Order and NPRM, at paras. 1, 5.

\(^7/\) Id., at para. 3.

\(^8/\) As acknowledged by the Commission, special access services are a key input in the service offerings provided to and by business customers, wireless carriers, interexchange carriers and competitive local exchange providers. Id., at para. 3.

\(^9/\) Id., at paras. 30-68.
demand and supply responsiveness and market share, and barriers to entry.\textsuperscript{10} Finally, the Commission seeks input on the relationship between the price cap regulatory regime and pricing flexibility rules.\textsuperscript{11} The Ratepayer Advocate addresses some of these issues in these initial comments. The Commission seeks cost studies and data from the participants on a variety of the above issues and the Ratepayer Advocate intends to review the information and submit more detailed reply comments based on its review and analysis of this material.

II. THE BENEFITS OF THE PRICING FLEXIBILITY RULES HAVE NOT MATERIALIZED AND THE COMMISSION SHOULD CONSIDER REPEALING THE RULES.

1. The Commission should continue to rely on pricing flexibility rules as part of its price cap regime only if judgments regarding the extent of marketplace competition are based on current, rather than predicted, market conditions.

The Commission tentatively concludes that it should continue to apply pricing flexibility rules “where competitive market forces constrain special access rates.”\textsuperscript{12} The Commission notes that it relied on an assessment of barriers to entry and supply responsiveness by CLECs to develop its competitive triggers in its \textit{Pricing Flexibility Order}.\textsuperscript{13} The Commission should perform additional marketplace analyses to determine the degree to which competition is actually occurring (as opposed to the potential for competition)

\begin{itemize}
\item\textsuperscript{10/} \textit{Id.}, at paras. 69-125.
\item\textsuperscript{11/} \textit{Id.}, at paras. 126-127.
\item\textsuperscript{12/} \textit{Id.}, at para. 24.
\end{itemize}
despite protestations that “such analyses would be unduly burdensome.”\textsuperscript{14} The commencement of the instant proceeding provides the opportunity for a reexamination of the rules and whether they are corroborated by actual marketplace developments. The Ratepayer Advocate urges the Commission to provide ample time and opportunity for all participants to review the data submitted in this proceeding.

2. \textbf{Initial evidence suggests that price cap LECs do not face pressure to lower special access rates even in those markets where they have gained pricing flexibility.}

The Commission seeks data regarding whether price cap LECs have been able to increase prices and sustain those prices. Additionally, the Commission is seeking comment on the extent to which any such price increases are substantial (though not necessarily large).\textsuperscript{15} Initial evidence provided by AT&T in its petition for rulemaking, suggests that price cap LECs have been able to raise prices without fear of loss of market share to other carriers. In fact, AT&T submits that BOC special access rates have increased or remained flat in every market where pricing flexibility has been granted.\textsuperscript{16} Indeed, the FCC notes that the BOCs have “earned special access accounting rates of return substantially in excess of the prescribed 11.25 rate of return that applies to rate of return LECs.”\textsuperscript{17}

\textbf{III. THE COMMISSION SHOULD ENSURE THAT CONSUMERS ARE PROTECTED FROM ANTI-COMPETITIVE BEHAVIOR ON THE PART OF PRICE CAP LECS AND THAT CONSUMERS SHARE IN ANY PROFITS DERIVED FROM MONOPOLY SERVICES.}

The Commission should adopt a price cap regime for special access that prevents (1) anti-
competitive behavior and (2) the extraction of supra-competitive profits from consumers. Competitive pressures appear to be insufficient to force the price cap LECs to flow through profits and, in addition, the predicted synergies accruing from the Verizon/MCI and SBC/ATT proposed mergers. If competition in the special access market continues to be a merely a prediction, then consumers of monopoly services (such as special access) should share in the benefits of supra-competitive profits and merger synergies through rate reductions, service innovation, or enhanced service quality. If the evidence presented in this proceedings shows that the special access market continue to be overwhelmingly controlled by the price cap LECs, the FCC should recognize that there still exists a lack of effective competition and thus regulate price cap LECs accordingly.

As the prospect for competitive markets shrinks and as the ILECs continue to re-monopolize telecommunications markets, the Commission should consider returning to rate of return regulation and reestablish an appropriate rate of return for special access services. In the alternative, the Commission should reestablish an earnings sharing mechanism and repeal its pricing flexibility rules. The combination of the BOCs’ supra-competitive special access profits and concerns about ILECs’ interaffiliate transactions suggest that federal and state regulators need to examine closely ILECs’ costs and revenues. Finally, the substantial synergies resulting from yet another wave of telecommunications mergers suggests that the Commission should consider accounting for the substantial synergies in both the productivity factor and an earning sharing mechanism, thus flowing through some of the substantial benefits of the mergers to customers.

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18/ In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control, FCC WC Docket No. 05-75; In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, FCC WC Docket No. 05-65.
IV. CONCLUSION

WHEREFORE the reasons set forth above the Ratepayer Advocate recommends that the Commission:

• Allow adequate time in the procedural schedule for analysis of the submitted cost studies and data and for reasoned reply comments;

• Consider the impact of any proposed price cap regulatory regime and the pricing flexibility rules on residential and business consumers, particularly those with low volumes, in rural areas, and/or with low incomes;

• Adopt competitive triggers for pricing flexibility requests that measure actual, rather than potential competition or, in the alternative, repeal the pricing flexibility rules;

• Ensure that any supra-competitive profits and/or merger synergies are flowed through to consumers through both an earnings sharing mechanism and the productivity factor;

• If the available marketplace data confirms that the BOCs yield substantial market power in the special access market, the Commission should consider reinitializing special access rates and adopting rate of return regulation and an appropriate rate of return that applies to rate of return LECs.

Respectfully submitted,

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