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June 22, 2009

EX PARTE

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W. – Room TW-A325
Washington, D.C. 20554

Re: *Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25*

Dear Ms. Dortch,

Congress, the Obama Administration and this Commission have established as a national priority nothing less than the ubiquitous deployment of broadband facilities and services to every American. Broadband investment is critical to economic growth and recovery, not only through the creation and preservation of jobs in the telecommunications sector, but also by amplifying the benefits of investment in other sectors through improvements in efficiency and productivity, as well as through development of new and improved broadband-related products and services. Broadband investment, for example, can enable remote health care applications, and expand access to and improve the quality of the healthcare system. It also can enable the transportation system to run more smoothly and efficiently, deliver new efficiencies to the electric grid, connect students to expanded educational resources, increase access to and the effectiveness of government, and provide new work options that cut down on the need to travel and commute to work, thereby reducing emissions and the costs associated with maintaining our transportation infrastructure. In short, broadband offers myriad benefits that will enhance our lives in many different ways. Encouraging deployment of broadband infrastructure capable of handling the high bandwidth demands of next generation devices is essential to ensure that all Americans will have access to the broad array of services and applications that only can be provided over higher speed broadband connections.

Recognizing that ubiquitous broadband deployment is a strategic, national imperative for policymakers, Sprint and others have sought to hitch to the broadband wagon their demands for government mandated reductions in ILEC special access rates and a return to monopoly era, rate-of-return price regulation of such services. These parties maintain that, if only the Commission imposed massive, across-the-board rate cuts and re-imposed onerous rate regulations on ILECs' TDM-based DS1 and DS3 services, the issue of how to encourage ubiquitous broadband deployment would be solved. But this approach ignores the limited role that copper, TDM-based services likely will play in a telecommunications environment in which millions of end users will possess wireless devices capable of accessing the Internet at speeds in excess of 10 Mbps and home computing devices capable of speeds 5 or 10 times greater. In this environment, service

providers will require backhaul speeds of 50 to 100 Mbps, scalable up to 1 Gbps, which will require high capacity fiber or microwave transmission facilities, not legacy TDM-based DS1s and DS3s. Indeed, far from being the panacea for broadband deployment they claim, these parties' regulatory prescription would only weaken broadband infrastructure providers' incentives and ability to invest in a next generation broadband America – if not kill them altogether.

While a broad spectrum of parties have offered a wide variety of different proposals for achieving ubiquitous broadband deployment, there is general agreement that: (i) broadband service is not yet available to everyone in this country; and (ii) significant additional and ongoing infrastructure investment will be required to fully realize the future promise of broadband. Addressing these two core issues will require significant additional broadband investment. Our National Broadband Plan and policies to implement that plan therefore must create incentives for private sector investment in broadband facilities.

AT&T is playing its part in achieving this national imperative. It is investing tens of billions of dollars of capital (more than \$55 billion between 2007 and YE2009) in our wireline and wireless broadband networks to increase its bandwidth capacity. Indeed, in 2009, AT&T will invest more in capital expenditures than any other publicly traded U.S. company. These investments are integral to fulfilling this nation's ambitious broadband goals. And, although a mere three years have passed since the SBC/AT&T merger, AT&T already has completely replaced the legacy AT&T OC-192 backbone (which was the principal capital asset of legacy AT&T at the time of the SBC/AT&T merger) with the world's first OC-768 backbone. Even so, AT&T is running just ahead of projected bandwidth demand, which is expected to quadruple in the next 3 years.

Other wireless companies are also investing heavily in fiber to upgrade their backhaul networks, pushing fiber to thousands of new cell sites and replacing legacy T1 lines with carrier-grade Ethernet links to meet rapidly growing demand for wireless data services.¹ Verizon has announced, for example, that it will lay fiber to about 90 percent of the cell towers in the carrier's territory in the next five years.² Taken together, AT&T and Verizon will represent a whopping 51 percent of total North American telecommunications capital expenditures in 2009.³

AT&T and Verizon are not alone though. Many other companies too have recognized the need to expand their networks to meet exploding bandwidth demand, and thus are investing heavily to expand the reach and capacity of their broadband fiber and microwave networks. For example, Clearwire is deploying a WiMax network that will reach 120 million people, including 75 percent of the top 50 markets by the end of 2010, and has stated that it has over 18,000 cell sites now under development.⁴ It further has announced that it plans to rely on “almost

¹ *The Wireless Industry's Dirty Little Secret*, VON Magazine (Apr. 15, 2009).

² *Id.*

³ Yankee Group, *Yankee Group's Global Telecommunications Capex Forecast* at 4 (Mar. 2009).

⁴ Clearwire Corp. Q4 2008 Earnings Call Transcript.

exclusively wireless backhaul,” which enables it to “keep the cost base as low as possible.”⁵ Likewise, FiberTower has greatly expanded the reach of its fixed wireless/fiber network, and touts its ability to rapidly and inexpensively extend its network to meet additional demand. As FiberTower’s Chief Operating Officer testified just last month:

We offer our services to mobile wireless carriers, competitive and local exchange carriers, 1st responder networks, and to government and enterprise customers. Our network currently covers approximately 12,000 route miles with 7,000 miles covered using fixed wireless and another 5,000 miles using dark fiber. Through our partnership and master lease agreements we have the ability to access over 100,000 towers nationwide. [] As of December 31, 2008 we provide backhaul service to over 6,000 mobile base stations (or cell sites) in 13 markets; We have customer agreements with the eight largest U.S. wireless carriers [] Our network is designed to be modular and is relatively inexpensive to deploy as compared to fixed wireline networks. [] We deploy networks to existing towers, rooftops, or other sites where wireless carriers have deployed cell sites.⁶

Level 3 also is expanding its fiber-optic network and service portfolio. For example, earlier this month, it announced it was expanding operations and its fiber-optic footprint (which already passed approximately 7,000 locations) in the Seattle area.⁷ In March, Level 3 told investors that “[o]ver 100,000 enterprise buildings [were] within 500 feet of [Level 3’s] US network.”⁸

Cable companies too are focusing on business customers and are investing billions of dollars in advanced fiber-optic infrastructure to compete in the market for high-capacity business services. Cablevision, for example, has invested more than \$1 billion to build an advanced fiber-optic network, and has boasted that it has more fiber in the New York/New Jersey/Connecticut tri-state area than any phone company and has fiber service to twice as many buildings in its New York footprint as Verizon.⁹ Cox too has built metropolitan fiber networks to provide dedicated services from 1.5 Mbps to OC-12 or higher, and considers its overall revenue

⁵ *Id.* See also J. Hodulik et al., UBS, *Clearwire Corp: Launching in an Unclear Environment* at 13 (Dec. 19, 2008) (UBS analysts report that Clearwire “expects roughly 80% of its backhaul to come from microwave links. Clearwire is buying its own microwave equipment and using unlicensed spectrum rather than contracting with a third-party wireless backhaul provider . . . Management believes this infrastructure will have lower latency and greater reliability than wired backhaul and will pay for itself in 10 months.”).

⁶ Testimony of Ravi Potharlanka, COO, FiberTower Corporation before the House Subcommittee on Communications, Technology and the Internet (May 7, 2009). See also Tower Cloud, *Services Overview*, www.towercloud.com/services.shtml.

⁷ *Level 3 Expands Operations in Seattle*, PRNewswire-FirstCall (Jun. 1, 2009).

⁸ Level 3, *Informational Investor Presentation*, at 7 (Mar. 17, 2009).

⁹ Optimum Lightpath, *Our Network*, <http://www.optimumlightpath.com/ourNetwork.shtml>; S. Moritz, *Cablevision’s Got Fiber*, TheStreet.com (Sept. 20, 2006); M. Farrell, *Cablevision Revs Up for Business Blitz*, Multichannel News (Sept. 25, 2006).

opportunity to be approximately \$5 billion.¹⁰ And Charter has deployed a state-of-the-art, fiber-based network to offer symmetrical access services with speeds from 2 Mbps up to 1Gbps over a single fiber connection.¹¹

The foregoing examples of broadband infrastructure investment are but the tip of the iceberg. As US Telecom will show in a forthcoming report on special access competition, dozens of service providers from all sectors of the communications industry have deployed truly high capacity fiber and fixed-wireless broadband infrastructure to meet ever-growing demand for more bandwidth, and are continuing to invest despite the downturn in the economy. This massive investment confirms a point on which virtually the entire industry, the Commission, and the courts agreed over five years ago: that service providers face no economic barriers to deploying their own facilities, and will readily build their own facilities to meet demand for such high capacity services.¹² It also confirms the wisdom of the Commission's hands-off policies with respect to high capacity facilities and services – including, in particular, its decisions to forbear from comprehensive Title II regulation with respect to OCn and packet-based services, and to eliminate unbundling obligations for those facilities and services.

Sprint, on the other hand, is going in the opposite direction. While others have been investing heavily in fiber and fixed microwave facilities to meet exploding demand for high bandwidth services, Sprint has been slashing capital expenses and thus its investment in infrastructure. In 2008, Sprint capital expenditures fell 58 percent from its 2007 level.¹³ That trend appears to be accelerating in 2009. In May, Sprint reported its first quarter 2009 financial results, which showed that its capital expenditures were down 79 percent over the same quarter

¹⁰ Cox Business, *Cox Optical Internet*, www.coxbusiness.com/products/data/opticalinternet.html; J. Baumgartner, *Cox Biz: Cable's Next Billionaire?*, Light Reading's Cable Digital News (Nov. 25, 2008), www.lightreading.com/document.asp?doc_id=168563&site=cdn (citing Cox Business vice president Phil Meeks).

¹¹ Charter Business, *Solutions by Industry*, www.charter-business.com/solutions-by-industry.aspx; Charter Business, *Charter Business® Fiber Internet*, www.charter-business.com/Fiber-Internet.aspx.

¹² See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 315 (2003) (“carriers are not impaired . . . without access to unbundled . . . OCn loops because . . . loops can be . . . self-deploy[ed] at the OC3 and above level”); *USTA v. FCC*, 188 F.3d 521, 527 (D.C. Cir. 1999); Comments of Association for Local Telecommunications Services (together with 20 other CLECs), FCC WC Docket No. 04-313, at 34 (April 5, 2002) (advocating that “[t]he Commission should require that loops of every capacity and type *except* OCn be unbundled”) (emphasis added); Worldcom Comments, FCC WC Docket No. 01-338, Fleming Decl. ¶ 10 (Oct. 4, 2004) (when customer demand is projected to be several DS3s or optical [OCn] a self-build decision is made); Comments of Time Warner Telecom, WC Docket Nos. 04-313, 01-338, at 3-4 (October 4, 2004) (explaining that it profitably deploys its own facilities for circuits that exceed DS3 capacity).

¹³ Yankee Group, *Yankee Group's Global Telecommunications Capex Forecast* at 5 (Mar. 2009).

last year.¹⁴ Thus, it seems inarguable that Sprint is slashing infrastructure investment to meet short-term financial objectives even as it demands massive, government-mandated cuts in ILEC rates for legacy TDM-based DS1 and DS3 services.

Sprint has sought to blame its precipitously declining capital expenditures on purportedly excessive and rising rates for ILEC special access services. In its recent comments in response to the Commission's NOI regarding a national broadband plan, Sprint claimed that purportedly "excessive" ILEC special access rates "have forced carriers such as Sprint to funnel billions of dollars that could have been invested in their own broadband networks and services into the overflowing coffers of the incumbent local exchange carriers (LECs) – in particular, AT&T and Verizon – that dominate the special access markets so completely."¹⁵ But, Sprint's claims simply do not add up. As an initial matter, as discussed above, the Commission already has rejected claims that competitors face economic barriers to deploy their own broadband facilities. Moreover, the massive investment in broadband infrastructure by a broad cross-section of the industry refutes its claims. Plainly, if ILEC special access rates were the dead weight loss and drag on investment that Sprint claims, these service providers would not have made the massive investments in broadband infrastructure they have.

In any event, over the same period that Sprint claims it was forced to divert billions of dollars from infrastructure investment to pay excessive and rising rates for ILEC special access services, AT&T and Verizon were subject to merger commitments that prohibited them from increasing their special access rates (and, in AT&T's case, to reduce its rates for DS1s, DS3s, and certain Ethernet services in areas where it had obtained Phase II pricing flexibility). Moreover, both the GAO and NRRI have found that the prices Sprint and others actually pay for ILEC special access services have been falling rapidly, including in areas in which they received complete pricing flexibility. Indeed, Sprint has never offered credible evidence that ILEC rates for such services are anything but reasonable. Rather, it has simply recycled claims regarding wildly excessive ILEC rates of return on special access services that have been thoroughly discredited by AT&T, Verizon and others, and which even NRRI has rejected as fallacious.¹⁶ The Commission thus should recognize Sprints claims for what they are, a cynical attempt to obtain government-mandated reductions in ILEC special access rates in order to alleviate some of the short-term financial and business pressures emanating from its merger with Nextel by packaging them as a broadband infrastructure initiative.

As should be obvious, however, Sprint's proposal will lead to less – not more – broadband infrastructure investment by all of the entities that are investing in this marketplace today. Artificially slashing and capping ILEC rates for legacy TDM-based DS1 and DS3 special

¹⁴ StreetInsider.com, *Sprint Nextel Reports First Quarter 2009 Results*, <http://www.streetinsider.com/Press+Releases/Sprint+Nextel+Reports+First+Quarter+2009+Results/4609667.html>.

¹⁵ Sprint Comments at 2, GN Docket No. 09-51 (filed Jun. 8, 2009).

¹⁶ P. Bluhm & R. Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets-Revised Edition* at 74 (2009) (NRRI Report) ("the RBOCs contend that the ARMIS figures are virtually meaningless. We agree with the RBOCs")

access services so that Sprint and others can get them at lower rates, rather than building their own facilities, will reduce every company's incentives to invest in fiber and other broadband network infrastructure. Sprint's own Chief Technology Officer has acknowledged as much. He observed that the reason microwave backhaul is not more prevalent in the United States is not because the technology is unavailable, untested, or uneconomic – as Sprint claims before the Commission – but rather because the price of DS1s is so low: “relatively abundant and inexpensive T-1s have stifled the technology [wireless backhaul] here.”¹⁷ As one analyst notes, “[w]ireless implementations of metro backhaul have long dominated in Europe. In North America, however, more TDM copper backhaul has been historically employed primarily as a result of low cost ILEC T1 TDM circuits available through US unbundling regulations.”¹⁸

Finally, as we have previously noted in this proceeding, all disinterested parties who have examined this issue in the past have agreed on one other issue (in addition to the fact that prices have been declining in this market over the past ten years): that the Commission does not currently possess sufficient information to understand exactly what is happening in this market principally because it has never required competing providers of special access and other high capacity transmission services to inform the Commission where they have deployed their own facilities, what services they offer in this market, and at what prices. In conducting their studies, neither GAO nor NRRI was successful at getting the competitive community to provide the data necessary for those entities to conduct a proper evaluation of the market (as each of them noted).¹⁹ Even today, the competitive community continues to balk at providing the data necessary for the Commission to fully evaluate the marketplace. AT&T, US Telecom, and others have submitted a proposal identifying the information the Commission should require competitive providers to submit to enable the Commission to make that evaluation. Especially in light of the many public announcements about significant fiber and microwave infrastructure investments being made today, the Commission should carefully evaluate the impact that re-regulation would have on those investments. And the Commission cannot perform that analysis without more information from competitive providers than it currently possesses today.

In the current economic environment, nothing is more important than encouraging private investment in infrastructure, and, in particular, broadband infrastructure in order to revive the

¹⁷ Stephen Lawson, *Sprint Picks Wireless backhaul for WiMAX*, The Industry Standard, July 9, 2008, available at <http://www.thestandard.com/news/2008/07/09/sprint-picks-wireless-backhaul-wimax> (Sprint CTO states that only reason microwave backhaul is not already as prevalent here as it is in the rest of the world is that “relatively abundant and inexpensive T-1s have stifled the technology here”).

¹⁸ E. Boch, *Backhaul for WiMax & LTE: High Bandwidth Ethernet Radio Systems at 22*, *Microwave Journal, International Edition* (Nov. 2008).

¹⁹ *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Report No. GAO-07-80 at 46-47 (Washington, D.C. Nov. 2006) (GAO Study) (noting that GAO had been unable to obtain from competing firms information on the buildings they serve, despite asking competitors (who are the only parties with complete information on their deployment of alternative facilities) to supply such data); P. Bluhm & R. Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets- Revised Edition* at 37, 40 (Jan. 21, 2009).

economy, promote job growth, and lay the basis for continued American leadership in the global economy. That will require the Commission and other government agencies to maintain policies hospitable to that investment, including minimizing regulatory burdens and government intervention in the market place absent compelling evidence of a market failure – evidence that is wholly lacking (and, indeed, has been soundly refuted) in the case of special access services. Indeed, because of the overwhelming increase in bandwidth demand, particularly for mobile broadband, fiber and other high capacity infrastructure, providers now find their facilities and services in heavy demand. With the demand for bandwidth finally exceeding the capacity of existing TDM-based special access services, infrastructure companies are making more investments in high capacity replacements where investment had previously not been made because of the ubiquity of inexpensive DS1 and DS3 special access services. This is a positive development with important benefits to the Nation. In contrast, Sprint’s proposal to turn back the clock and return to onerous rate-of-return regulation for special access services will do nothing to promote the investment in and deployment of broadband facilities currently underway, and would in fact be counter-productive. By chilling this important broadband infrastructure investment, and the job creation that accompanies it, Sprint’s proposal would retard the very advances most needed for America’s broadband future. Because the stakes are so high, the Commission truly needs to understand more about the facts and investment being made in these markets today to ensure that the policies it enunciates continue to promote investment in high capacity broadband infrastructure rather than discourage that investment.

Very truly yours,



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