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IN WC DOCKET NO. 05-25

November 4, 2009

EX PARTE

Ms. 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:

In the past several months it has become increasingly evident, as AT&T previously has shown, that the ILECs' legacy copper and TDM-based DS1 and DS3 services, which have been the focus of debate in the Commission's special access proceeding, cannot meet the rapidly exploding bandwidth needs of next generation broadband devices and services.[1] In an environment in which millions of end users will be using wireless devices capable of accessing the Internet at speeds in excess of 10 Mbps and home computing devices with even faster speeds, service providers will require backhaul transmission capacities that can only be met through fiber optic or microwave transmission facilities, not copper and TDM-based DS1s and DS3s.[2] This rapidly growing need for bandwidth and ever higher transmission speeds has created a compelling business case for investment in high-capacity backhaul infrastructure by a broad cross-section of providers (including LECs, cable companies and wireless providers), including in areas where such investment previously did not make sense due to the ubiquitous availability of inexpensive DS1 and DS3 special access services.[3]

Participants in the Commission's broadband workshops, independent analyst reports and other publicly available sources dramatically confirm each of these points. Last month, for example, T-Mobile filed an *ex parte* showing that its G1 customers use 50 times the data of the average T-Mobile customer, and that wireless laptops will use 450 times the amount of data.[4] It

[1] AT&T June 22 Letter at 1-2.

[2] *Id.*

[3] *Id.* at 7.

[4] *Ex Parte* Letter of Kathleen O'Brien Ham (T-Mobile) to Marlene H. Dortch (FCC) dated Aug. 6, 2009, Attachment at 9-10.

further explained that, due to this "exponential growth in wireless data use," the "demand for bandwidth has exploded," and "will only accelerate."[5] Likewise, an independent analyst has estimated that "mobile traffic will have a CAGR [compound annual growth rate] of 130 percent from 2009 through 2012 – that is, 1 MB of traffic in 2008 will equal 28 MB of traffic in 2012."[6] AT&T's own wireless data traffic has grown almost 5,000% over the 12 quarters between 3Q06 and 2Q09.[7]

Panelists in the Commission's broadband workshops unanimously agreed that, with this huge increase in traffic, service providers will require vastly greater backhaul transmission capacity and speeds than are currently available – particularly for wireless backhaul transport. They further agreed that the answer to these backhaul needs lies not with legacy copper, TDM-based T1s, but with fiber and microwave transmission facilities. For example, Craig Moffett emphasized that it was "obvious[]" that demand for broadband backhaul would require "providing more than T1s in and out of the towers. . . . It's a foregone conclusion you're going to have to bring fiber."[8] Or, as David Amentrout (FiberNet) put it, in this environment, "T1s are out . . . it's either going to be fiber or its going to be microwave."[9] The Yankee Group too has projected that "[w]ithin the next five years, service providers will have to: transition from TDM to packet based backhaul; [and] . . . transition to fiber backhaul and microwave" to meet backhaul needs that will increase from 10 Mbps today to 50 Mbps in two years.[10] And Dan Graf of Leap Wireless recently observed that "4G will require bandwidth that current TDM networks

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[5] *Id.*

[6] Yankee Group, Anchor Report, *Mobile Backhaul: Will the Levees Hold*? (June 2009).

[7] Kris Rinne (AT&T), "The Fast Track to 4G Using HSPA and 700 MHz Spectrum, Sept. 16, 2009.

[8] *See* National Broadband Plan Workshop; Deployment – Wired Transcript (Aug. 12, 2009), at 25-26 (Craig Moffett).

[9] National Broadband Plan Workshop; Deployment – Wired Transcript (Aug. 12, 2009), at 45 (David Armentrout, FiberNet). *See also id.* at 31 (David Armentrout, FiberNet) ("obviously more and more of the towers will require fiber backhaul").

[10] Yankee Group 4G Network Backhaul Summit, Powerpoint Presentation of Jennifer Pigg, (Yankee Group) (Sept. 15, 2009). *See also* Yankee Group, Anchor Report, *The Inevitable Transformation of the Mobile Internet* at 3 (April 2009) ("Backhaul networks, which in most cases continue to be based on TDM and Frame Relay technologies cannot support the massive growth in broadband traffic demands."); Yankee Group, Anchor Report, *Mobile Backhaul: Will the Levees Hold?* (June 2009), at 4 (in 2008, there were 228,000 cell sites served by between 5 Mbps and 10Mbps of backhaul capacity, on average; "[b]y 2012, we expect to see more than 300,000 cell sites in the U.S., each supporting between 50 Mbps and 100 Mbps in backhaul capacity. . . . If we were to keep throwing T1s at the problem, this would result in a backhaul bill of $82 billion by 2012 and the monthly average cost per site would be about $23,000 compared to today's average of $2,100").

cannot provide economically."[11] Yet, as both Hunter Newby (Allied Fiber) and Tom Swanobori (Verizon) observed, "less than 10 percent of the [wireless] towers in the U.S. have fiber" backhaul today,[12] which means that the vast majority (between 80 and 90 percent) of wireless cell sites are still served by legacy copper, TDM-based T1s.[13]

Plainly, then, much of the existing backhaul infrastructure will need to be replaced in order to meet the insatiable demand for bandwidth of next generation broadband technologies and services, creating a significant business opportunity for innovation and investment in backhaul. And the record shows that providers of all stripes (including carriers, cable companies, and fixed wireless providers) are heeding the call of the trumpet. tw telecom, for example, has continued to expand its fiber optic network, adding over 1,000 route miles and constructing fiber to more than 1,000 commercial buildings in 2008, and serving thousands of business customers and several hundred service providers – including IXCs, ISPs and wireless carriers.[14] Likewise, cable companies are stepping up their investment in fiber and Ethernet to provide high-capacity transmission services in competition to ILEC special access services not only to business customers but also to wireless cell sites throughout their footprints – a point confirmed by cable companies and purchasers of backhaul alike.[15] Wireless carriers too are

[11] Yankee Group 4G Network Backhaul Summit, Powerpoint Presentation of Dan Graf, Leap Wireless at 4 (Sept. 15, 2009).

[12] National Broadband Plan Workshop; Deployment – Wired Transcript (Aug. 12, 2009), at 23 (Hunter Newby, Allied Fiber) ("There is less than 10 percent of the towers in the U.S. have fiber"); *id.* at 45 (David Armentrout, FiberNet) ("the majority of the towers in our markets are T1-fed today"); National Broadband Plan Workshop; Wireless Broadband Deployment – General Transcript (Aug. 12, 2009), at 44 (Tom Swanobori, Verizon) ("regarding the number of cell sites with fiber backhaul, "it might be even less than that [10 percent]"). *See also* Yankee Group 4G Network Backhaul Summit, Powerpoint Presentation of John Saw, CTO Clearwire (Sept. 15, 2009), at 4 (">80% of US cell sites are still fed with copper based TDM circuits"); Yankee Group, Anchor Report, *Mobile Backhaul: Will the Levees Hold?* (June 2009) at 6 (chart showing between 85 and 90 percent of backhaul comes from leased T1s or E1s).

[13] *See supra* notes 10, 12.

[14] Current Analysis, Inc., tw telecom Company Assessment at 2-3 (Report Date: Sept. 4, 2009), available at www.currentanalysis.com.

[15] *See* National Broadband Plan Workshop; Deployment – Wired Transcript (Aug. 12, 2009), at 35 (Dallas Clement, Cox) ("Relative to wireless back haul from cell sites . . . in our commercial business it's a growth area. We're getting calls in our franchises from wireless providers who are preparing for their 4G networks and they're looking for lower cost alternatives for back haul. And because we're there and we can do sort of spurs off of our network, we feel as though it's a big growth area and we're deploying capital to that area to be able to satisfy that demand"); National Broadband Plan Workshop; Wireless Broadband Deployment – General Transcript (Aug. 12, 2009), at 45-46 (Neville Ray, T-Mobile) ("And, you know, be that fixed Ethernet delivery in one form or another over fiber, over coax, whatever it might be, you know, we are seeing economic forces at work in major metro areas where that is starting to change. So if I

upgrading their backhaul facilities to fiber and microwave.[16] US Cellular Corp., for example, has reported that it "makes very extensive use of . . . common carrier microwave facilities to link its base stations with each other and with USCC's switches;"[17] and, indeed, already has such backhaul facilities to approximately 40 percent of its cell sites.[18]

Recognizing that evidence regarding the plethora of cable and fixed wireless providers entering the market to provide competitive backhaul services is fatal to their claims regarding the need to re-regulate ILEC special access services, Sprint, tw telecom, and others attempt to discount this competition by asserting that it is not ready for prime time. Sprint, for example, recently filed comments in the Verizon and Qwest Forbearance Proceedings, claiming that, while cable may have begun to provide competitive high capacity services, they "lack[] facilities to wireless towers" and purportedly "lack interest in serving this market for wholesale purposes."[19] Likewise, the Joint Commenters (tw telecom, One Communications, Cbeyond and Integra)

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look at our 3G footprint today, we are certainly moving to, you know, a fiber back haul solution environment which is significantly higher than 10 percent. And I think that competitive forces work in metro areas where there's a lot of fiber, be that from the utility company, from the cable company, from the existing, you know, telco provider"). *See also* Yankee Group 4G Network Backhaul Summit, Powerpoint Presentation of CFN Services (Sept. 15, 2009), at 4 ("Time Warner, Comcast, Cox and other MSOs are adding cell sites to their existing (typically Ethernet) fiber networks"); *Ex Parte* Letter of Steven F. Morris (Assoc. Gen. Counsel, NCTA) to Marlene H. Dortch (Secretary, FCC), WC Docket No. 05-25 (filed May 8, 2009) ("many cable operators provide high capacity services that compete with special access services offered by incumbent local exchange carriers" . . . they "offer these services to businesses and to telecommunications providers and in most cases they own the facilities used to provide these services").

[16] *See* National Broadband Plan Workshop; Wireless Broadband Deployment – General Transcript (Aug. 12, 2009), at 69 (Neville Ray, T-Mobile) ("the T-Mobile plan is to get fiber to everything we can because we think that future-proofs the network and moves us into a cost structure very early on which enables us to grow our customer base"); *id.* at 47 (Jake Macleod, Bechtel Telecom) ("the ultimate solution is fiber to the cell site. If you look at some of the foreign countries we deal with a lot, they're north of 90 percent fiber to the cell sites"); Yankee Group 4G Network Backhaul Summit, Powerpoint Presentation of CFN Services (Sept. 15, 2009), at 4 ("ILECs and MSOs are aggressively building out the fiber infrastructure; Verizon (ILEC) will have fiber to 80%+ of all sites in region by 2012; AT&T (ILEC) has fiber deployed or planned to most high capacity sites; . . . CLECs, Utilities, and other Alternative Access Vendors, More limited fiber footprint than incumbents but better economics").

[17] Comments of U.S. Cellular Corp. ("USCC"), WT Docket No. 09-106 at 1 (filed Jul. 27, 2009).

[18] In July, USCC reported that it had 2,350 microwave backhaul connections, *id.*, out of about 6,400 total cell sites. http://en.wikipedia.org/wiki/U.S._Cellular (last checked Sept. 25, 2009). USCC thus has microwave backhaul connections to approximately 40 percent of its cell sites.

[19] Comments of Sprint Nextel Corp., WC Docket Nos. 06-172, 07-97 at 7-8 (filed Sept. 21, 2009) ("Sprint Forbearance Comments").

contend that the Commission's workshops established that business customers and purchasers of wireless backhaul "demand service with attributes that are only available on service provided via traditional wireline facilities; fixed and mobile wireless as well as cable modem services are simply not up to the task,"[20] and, in any event, "cable company networks often do not serve rural and sparsely populated areas" and thus are not a substitute for wireline broadband.[21]

Wholly apart from the fact that these parties cite literally nothing to support these claims,[22] it is quite plain that cable companies and the many wireless providers that actually use cable and wireless backhaul services disagree. As noted above, cable companies are investing heavily to expand their networks in order to provide broadband (including wireless backhaul services) and purchasers increasingly are relying on cable companies to meet their backhaul needs.[23] Comcast, for example, has identified business services as its "Next Growth Opportunity and set a goal of capturing 20-25 percent of the small to medium business market.[24] Comcast also recently agreed to purchase a CLEC in Chicago in order to accelerate its move to serve larger, mid-tier business customers with up to 250 employees.[25] But Comcast is not alone; NCTA has reported that "many cable operators provide high-capacity services that compete with special access services offered by incumbent local exchange carriers."[26] Indeed, in an interview earlier this year, T-Mobile's chief technology officer confirmed that cable, microwave and competitive fiber all are options. Specifically, he stated that T-Mobile was pursuing multiple paths to address its need for backhaul, including obtaining fiber from "alternate access companies," and "more promising[ly] . . . the cable industry. So it's been in the last year or so that we've really started to make significant progress in partnering with the cable industry in terms of how we leverage their broadband capacity and how we can extend it to the cell site. The third, a more organic opportunity, is to simply build high-capacity microwave."[27]

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[20] Joint Commenters' Workshop Response at 2-3.

[21] *Id.* at 2.

[22] *See* Sprint Forbearance Comments at 7-8; Joint Commenters' Workshop Response at 2-3.

[23] *See supra* note 15 and accompanying text.

[24] Comcast Corporation Presentation at UBS Global Media and Communications Conference, slide 13, Dec. 8, 2008, available at: http://files.shareholder.com/downloads/CMCSA/745417734x0x299910/228789aa-1051-4e9e-a4e0-01953d0710a9/UBS2008Slides_FINAL.pdf.

[25] Comcast Snares a CLEC, J. Baumgartner, Cable Digital News, Oct. 7, 2009, available at: http://www.lightreading.com/document.asp?doc_id=182786&site=cdn&.

[26] Letter from Steven Morris, NCTA, to Marlene Dortch, FCC, WC Docket No. 05-25 (May 8, 2009). *See also* US Telecom, *High Capacity Services: Abundant, Affordable, and Evolving* at 12-16 (rel. July 2009).

[27] http://gigaom.com/2009/05/12/the-gigaom-interview-cole-brodman-cto-t-mobile-usa.

T-Mobile's Chief Technology Officer may have gone "off-script" when he acknowledged the availability of these alternatives, but his frank testimony is consistent with the facts on the ground and the testimony of numerous panelists in the Commission's recent broadband workshops. For example, Clearwire is using microwave backhaul for 90% of its cell sites.[28] Likewise, USCC has publicly reported that approximately 40 percent of its cell sites are served by microwave backhaul connections.[29] And numerous panelists at the Commission's recent broadband workshops identified microwave as a backhaul option – and one that was particularly well-suited for less densely populated areas. For example, Neville Ray, from T-Mobile, observed that, "as you move to suburban fringe and rural areas, . . . [fiber] opportunities are much tougher to find, but there are good microwave solutions, as Ed [Evans, Stelera Wireless] mentioned, and some carriers are totally deploying their back haul solutions on a microwave basis."[30] Similarly, Tom Swanobori, from Verizon, noted that "[t]here are microwave solutions of significant bandwidth that will support LTE and other fourth generation technologies."[31]

That microwave is a viable backhaul medium for wireless is further confirmed by the dominant reliance of wireless carriers on microwave backhaul throughout the rest of the world. At a summit on 4G backhaul earlier this month, for example, Ericsson observed that, in today's mobile backhaul networks, microwave is the dominant form of connection between cell sites for networks in Latin America, Western Europe, Central & Eastern Europe, the Middle East and Asia (except for China, where the dominant form is fiber), and the Asia/Pacific region, whereas, in the United States, the dominant type of connection today is copper.[32] Moreover, the reason

[28] Yankee Group 4G Network Backhaul Summit, Powerpoint Presentation of John Saw, CTO Clearwire (Sept. 15, 2009) ("90% of Clearwire cell sites use microwave backhaul; Largest wireless backhaul network in North America"; "Rapid rollout," "Very low recurring costs," "Tremendous scalability, 50 Mbps – 1 Gbps of backhaul per site").

[29] *See supra* note 18.

[30] *See* National Broadband Plan Workshop; Wireless Broadband Deployment – General Transcript (Aug. 12, 2009), at 45-46 (Neville Ray, T-Mobile).

[31] National Broadband Plan Workshop; Wireless Broadband Deployment –General Transcript (Aug. 12, 2009), at 47 (Tom Sawnobori, Verizon). *See also* National Broadband Plan Workshop; Deployment – Wired Transcript (Aug. 12, 2009), at 30 (Hunter Newby, Allied Fiber) ("it's the combination of fiber and microwave, which for backhaul from towers that don't have much fiber can cover a much larger swath of the country along this way"); *id.* at 46 (Jake Macleod, Bechtel Telecommunications) ("Obviously, a lot of carriers are now moving to Ethernet, and wireless is definitely a solution, but typically only where you can't get fiber or high-speed Ethernet solution"); Yankee Group 4G Network Backhaul Summit, Powerpoint Presentation of CFN Services (Sept. 15, 2009), at 3 ("The higher your bandwidth requirements the more fiber you'll need; A 90% microwave architecture can safely support 50-100Mbps per site today").

[32] Yankee Group 4G Network Backhaul Summit, Powerpoint Presentation of Rajesh Chundry (Ericsson) at Slide 4 (Sept. 15, 2009).

microwave is not used more often in the United States is not because it is not economically viable or technically feasible, but because legacy copper, TDM-based T1s are so cheap[33] – a point confirmed by Sprint's own CTO.[34]

It should be obvious that, in this environment, in which demand for bandwidth is exploding and myriad providers are investing in a variety of broadband transmission technologies and infrastructure to meet that demand, slashing ILEC's special access rates on legacy copper and TDM-based DS1s and DS3s will lead to less – not more – broadband infrastructure investment by all providers. As Craig Moffett of Sanford Research observed at the Commission's broadband workshop on deployment, "unless [service providers] are earning an acceptable return on capital," broadband deployment "is not viable," which is a "real problem" because "[t]he returns on capital of the telecom operators are not very good," and "[t]he returns on capital on the broadband deployments, even in the dense markets, are truly awful."[35] Mr. Moffett further observed that the wireline business "is in real trouble" because the costs of the network are being "reallocated because the wired voice business is going away quite rapidly."[36] Forcing ILECs to slash special access rates to below-market levels plainly will only make matters worse, and deprive them of the capital needed to continue investing in broadband infrastructure. It also would encourage continued reliance on legacy copper and TDM-based special access services, and thus discourage competitors from investing in their own networks or purchasing alternative, higher capacity facilities. As Sprint's CTO observed, the ready supply of inexpensive TDM-based DS1s already has dampened development and deployment of microwave backhaul in the United States; further lowering the price of such services will only exacerbate the problem and destroy incentives to invest in microwave and other broadband transmission technologies and infrastructure. The special access re-regulation proponents' proposals thus are antithetical to the Commission's and Congress's objectives to encourage investment in high capacity broadband infrastructure, and should be rejected.

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[33] Yankee Group, Anchor Report, *Mobile Backhaul: Will the Levees Hold?* (June 2009) ("In the U.S., the backhaul technology of choice tends to be T1s [because] [w]hen mobile networks were being deployed in the U.S. in the 80s and early 90s, T1 was comparatively inexpensive and spectrum was scarce. In Europe, the dominant technology is microwave because when MNOs were deploying their networks in Europe, spectrum was plentiful and DS1 pricing . . . was extortionary").

[34] 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 quoted as saying the reason microwave backhaul not 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" (emphasis added)).

[35] National Broadband Plan Workshop; Deployment – Wired Transcript (Aug. 12, 2009) at 12-13 (Craig Moffett, Sanford Bernstein).

[36] *Id.* at 13.

In the remainder of this *ex parte*, AT&T provides new evidence countering claims by BT and T-Mobile that ILEC special access rates are too high. We also rebut tw telecom's claim that the most appropriate way to evaluate special access competition and the purported need for re-regulation of ILEC special access services is not to gather and examine data regarding the extent of actual and potential competition to those services but rather to measure ILEC's "accounting profit margins" to determine whether they have market power.

AT&T's Rates for Special Access Services Are Lower than The Rates it Pays for Comparable Services Provided by Proponents of Special Access Re-Regulation.

Throughout the course of this proceeding, AT&T has repeatedly rebutted claims that special access rates are too high.[37] We have shown that those claims are based on a misuse of ARMIS data and illegitimate comparisons of "unlike" facilities or services. We do not repeat those arguments here. We do, however, respond to the latest variation on that argument from one of the more vociferous advocates of special access price reductions – BT – which claims that special access rates in the United Kingdom are lower than in the United States. In fact, just the opposite is true: BT's purported comparison is riddled with flaws and a true comparison of rates in the United States with those in the United Kingdom reveals that rates in this country are considerably *lower* than in the UK. While we were at it, we also compared special access rates of Deutsche Telecom, the parent company of T-Mobile — another proponent of mandated special access reductions. We discovered that its rates, as well, are substantially higher than those charged by AT&T. Specifically, AT&T compared the average revenue per unit it earned from the sale of DS1s and DS3s to BT and T-Mobile in the United States to the average price it paid to BT and Deutsche Telecom in Europe for comparable services on a per circuit and per Megabit basis, both in absolute terms and normalized for differences in mileage, and found that both BT's and Deutsche Telecom's rates are significantly higher than AT&T's.

*****Begin Highly Confidential*****

*****End Highly Confidential*****

The above chart demonstrates that BT's recent *ex parte*, which purports to show that rates in the United States for equivalent access products are more expensive than those in the United Kingdom, is way off the mark.[38] Its comparison was flawed for a number of reasons, including that BT converted UK rates to USD using the OECD's 2009 Purchasing Power Parities rate rather than actual currency exchange rates, which discounts BT's rates by 14 percent below what its services would cost if purchased using dollars exchanged commercially at a bank. In

[37] *See e.g.* AT&T 2005 Reply Comments, WC Docket No. 05-25 (filed Jul. 29, 2005); AT&T 2007 Comments, WC Docket No. 05-25 (filed Aug. 8, 2007); *Ex Parte* Letter of Robert W. Quinn (AT&T) to Marlene H. Dortch, WC Docket No. 05-25 (filed Feb. 6, 2009).

[38] *Ex Parte* Letter of Sheba Chacko (BT) to Marlene H. Dortch (FCC, Secretary), WC Docket No. 05-25 (filed Sept. 18, 2009).

addition, BT's analysis does not appear to have compared "equivalent" access product as BT claims. For example, BT compares the rates of various U.S. providers for DS3 (45 Mbps) special access services to its purportedly equivalent 45 Mbps PPC access service in the United Kingdom. In calculating a per circuit rate for DS3s in the United States, BT assumed a circuit with ten miles of interoffice transport and two channel terminations. It then compared those rates to its rates for a hypothetical circuit consisting of a "main link" of ten miles, but only one channel termination and a "hand over" charge. While BT provides no explanation of what the "hand over" charge represents, it appears to be a fraction of the rate BT charges for a much higher capacity service, which is not directly comparable to the price of a lower-speed channel termination. Additionally, BT's analysis failed to make any provision for the myriad discounts and credits offered by price cap ILECs, which substantially reduce the amount customers actually pay for ILEC special access services. BT itself has benefited from such discounts, and consequently pays well below the rack rates identified in its analysis for AT&T – as demonstrated by the foregoing table comparing the average rates charged to BT for services provided in the United States with the average rates AT&T pays to BT for comparable services in Europe.

Accounting Profits are Irrelevant as a Measure of Competition

Finally, as noted above, tw telecom claims that the Commission should not bother collecting information about "the location and potential reach of [competitors'] networks" (which it asserts is a "red herring"),[39] or, in other words, about the true extent of actual and potential competition (*i.e.*, the data that the GAO, NRRI, and others have identified as the real gap in the record). It argues that, instead, any "information gathering" efforts should "focus primarily" on an attempt to determine the incumbent LECs' "accounting profit margins" because they purportedly are the "best measure" and "the most probative evidence of the extent to which they have market power."[40] This claim is astounding. It is not supported by the source on which tw telecom relies, and is refuted by decades of decisions that establish the practical impossibility, arbitrariness, and meaninglessness of the inquiry that tw telecom proposes.

As an initial matter, tw telecom's argument mischaracterizes the declaration even of its own economist, Dr. Stanley Besen. tw telecom asserts that Dr. Besen states that "profit margins are the best measure of the extent to which incumbents have market power."[41] But Dr. Besen never says that anywhere in his declaration. Indeed, as discussed below, Dr. Besen does not venture an opinion anywhere in his declaration on what is an appropriate (let alone what is the "*best*") "measure of the extent to which incumbents have market power" (*i.e.*, the extent of competition in) a particular market, as tw telecom claims.[42] Nor does he state that it is even possible accurately to measure these margins.

[39] See tw telecom July 9 Letter at 1-2, 10

[40] Id. at 9-10.

[41] Id. at 1-2 (emphasis added).

[42] Id., Attachment B., ¶¶ 3-12.

In fact, Dr. Besen has elsewhere *rejected* the position that tw telecom now attempts to attribute to him. In the mid-1980s, for example, Dr. Besen wrote an academic paper that condemned the use of accounting profits as a gauge of economic efficiency and market power of broadcast stations.[43] As the FTC explained, in that paper, Dr. Besen found "problems . . . with studies examining . . . profit margins of broadcast stations [because] profit margins are subject to the conventional criticisms of the use of accounting data."[44] And, in 1994, he filed a paper with the Commission concluding that the there was "substantial competition" in the market for mobile telecommunications based on actual "market dynamics" such as "rapidly increasing volume, declining real prices, expanded service offerings, growing capacity, and significant technological change"[45] – precisely what AT&T has advocated should be the Commission's focus here. It is thus quite remarkable that tw telecom would claim that Dr. Besen holds the opposite position.

It is not surprising that tw telecom would have to resort to mischaracterizing its own economist to support the notion that accounting profits are even an acceptable (much less the "best") measure of market power. There are fewer propositions in the field of economics that are more widely accepted than the meaninglessness of accounting profits.[46] As the Commission's chief economist has previously explained, "high profits or margins might reflect efficiencies, such as low costs or superior product design, rather than market power" and therefore antitrust authorities today do not rely on "profitability measures in making inferences about market power."[47] Indeed, the Commission itself already has rejected the notion that profit margins

[43] Reply Comments of the Staff of the Bureau of Economics of the Federal Trade Commission, Revision of Radio Rules and Policies, MM Docket No. 91-140, 1991 FCC LEXIS 4913, *37-38 (Sep. 5, 1991), citing Besen, Stanley M. and Leland L. Johnson (1984), Regulation of Media Ownership by the Federal Communications Commission, Rand.

[44] *Id.*

[45] Stanley M. Besen, Concentration, Competition, And Performance In The Mobile Telecommunications Service Market, at 5, 9 (Sep. 9, 1994), attached to Consolidated Comments of GTE et al., Petition To Extend State Authority Over Rate And Entry Regulation Of All Commercial Mobile Radio Services Of The Arizona Corporation Commission, PR 94-104 (Sep. 19, 1994).

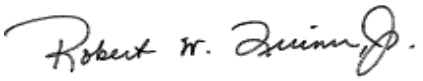
[46] See, e.g., Franklin M. Fisher, Economic Analysis And "Bright-Line" Tests, J. of Competition L. & Econ., at 139 (2008) ("[t]he most important . . . misconception[] is to believe the following argument: Economic analysis shows that economic profits . . . are zero under competition. Hence . . . profitable firms must have market power. This is a fundamental misunderstanding of basic economic principles"); F. Fisher and J. McGowan, *On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*, 73 American Economic Review 82, 83 (March 1983) (concluding that relying on "accounting rates of return to make inferences about monopoly profits is a baseless procedure"); F. Fisher, *The Misuse of Accounting Rates of Return: Reply*, 74 American Economic Review 509 (June 1984).

[47] Jonathan B. Baker & Timothy F. Bresnahan, Empirical Methods of Identifying and Measuring Market Power, 61 Antitrust L.J. 3, 5 (1992).

(particularly those calculated on a service-specific basis) are an appropriate basis for evaluating competition in this very proceeding: "High or increasing rates of return calculated using regulatory cost assignments for special access services do not themselves indicate the exercise of monopoly power."[48]

If you have any questions regarding the matters discussed herein, please contact the undersigned.

Sincerely,



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[48] Special Access Rates for Price Cap Local Exchange Carriers, Order and Notice of Proposed Rulemaking, FCC 05-18, WC Docket No. 05-25, ¶ 129 (rel. Jan. 31, 2005).

Federal Communications Commission

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