Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

PAPERWORK REDUCTION ACT
COMMENTS OF AT&T INC.

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AT&T Inc. ("AT&T"), on behalf of itself and its affiliates, respectfully submits these comments regarding the Commission's compliance with the Paperwork Reduction Act ("PRA")[1] in adopting the proposed information collection in the Commission's *Notice*[2] in the above-captioned proceeding.[3]

INTRODUCTION AND SUMMARY

As AT&T stated in its comments submitted in response to the *Notice*,[4] it fully supports

[1] 44 U.S.C. §§ 3501-20.

[2] Report and Order and Further Notice of Proposed Rulemaking, *Special Access for Price Cap Local Exchange Carriers*, 27 FCC Rcd. 16318 (rel. Dec. 18, 2012) ("*Notice*"). The information collection requirements, entitled "Mandatory Data Collection," are set forth in Appendix A to the *Notice*.

[3] Notice of Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested, 78 Fed. Reg. 9911 (rel. Feb. 12, 2013) ("*Federal Register Notice*").

[4] *See* Comments of AT&T Inc. at 11 (Feb. 11, 2013) ("AT&T Comments") ("AT&T strongly supports actions to ensure the Commission has a complete and robust record of the deployment of alternative dedicated access facilities."); Reply Comments of AT&T Inc. (Mar. 12, 2013) ("AT&T Reply Comments").

the forthcoming data collection effort that is at the heart of this proceeding, and, specifically, the requests that are aimed at developing information relating to network facilities operated by *all* providers of dedicated special access services. Only by requiring all providers to submit detailed information about the scope and location of their networks can the Commission accomplish the primary goal of this proceeding, which is to conduct a rigorous analysis of its pricing flexibility rules and then, based on its determinations as to where competitors have sunk investment in network facilities capable of serving special access customers, either re-adopt or adjust its pricing flexibility triggers as appropriate. Proponents of more restrictive common carrier regulation have steadfastly refused to provide such information for years, and the mandatory data collection finally should provide the Commission with an empirical basis for evaluating its pricing flexibility rules. It is particularly important that the Commission move forward with this effort because it suspended the operation of the pricing flexibility rules pending this inquiry.[5]

The Commission's proposed data collection properly requests detailed facilities information from both competitive providers and incumbent providers of special access services.[6] These carriers are required to provide, on a nationwide basis, information about each location to which they provided a special access connection (whether owned, leased, or obtained as an unbundled network element) as of the end of 2010 and 2012, including information regarding bandwidth and whether the connection was provided using fiber.[7] Correspondingly, special access purchasers are required to provide detailed information about their special access

[5] Report and Order, *Special Access for Price Cap Local Exchange Carriers*, 27 FCC Rcd. 10557 (rel. Aug. 22, 2012) ("*Pricing Flexibility Suspension Order*").

[6] *Notice*, App. A ¶¶ II.A.3-11, II.B.2-3.

[7] *Id.* ¶¶ II.A.3-4 (competitive providers); II.B.2-3 (incumbent providers).

demand in 2010 and 2012, including their total expenditures, broken down by type of provider (incumbent or competitive) and type of service.[8]

As explained in more detail below, the PRA limits the Commission's data collection efforts to information that is (1) "useful" to the Commission in a "practical" way, *i.e.*, the data to be collected must be accurate, valid, and reliable, such that the Commission can actually use it to craft administratively workable rules; (2) "timely," such that the Commission can accurately and efficiently process the data it collects without substantial delay; and (3) "necessary" to the Commission's proper functions, *i.e.*, data cannot be collected if the Commission can rely on other, more readily available information.[9]

The information the Commission has proposed to collect regarding the location of all providers' special access facilities (and purchasers' demand) readily satisfies these PRA requirements. So long as respondents fully and fairly comply with the Commission's facilities requests, this data should meet the "reliable, accurate, and useful" standard, particularly as it will allow the Commission to evaluate the extent of facilities-based competition and assess the longstanding claims of proponents of regulation that there are no marketplace alternatives to incumbent LEC special access services. Although the volume of facilities information collected will be sizable in light of the vibrant competitive market for special access services, the information can be analyzed in a reasonable amount of time without extraordinary effort, and should allow the Commission to make administratively workable adjustments to its existing rules to the extent necessary. Further, because collecting data only from some providers would present an inaccurate and incomplete picture of competition, it is plainly necessary for the Commission to collect facilities information from *all* providers of special access services.

[8] *Id.* ¶¶ II.E.1-2, II.F.1-7.

[9] *See infra* page 6; 44 U.S.C. §§ 3501, 3508; 5 C.F.R. § 1320.3(l).

AT&T thus supports these core components of the proposed information collection and agrees that they satisfy the requirements of the PRA.

The same does not hold true, however, for one category of the proposed data collection – the requests concerning pricing information.[10] In those requests the Commission asks special access providers to compile extensively detailed information, at circuit and rate-element levels for each month in both 2010 and 2012, concerning all of their charges billed for special access services at every building and location in the country.[11] Moreover, the explicit language of the proposed requests would require providers to also gather detailed information on any rate "adjustment, rebate, or true-up," including the "scope" and "reason" for such changes.[12] In all, the Commission's proposed pricing requests may include up to *thirty-six* sub-parts of information for *each* dedicated access circuit.[13]

Unlike the core network location data, these pricing data requests plainly violate the requirements of the PRA. *First*, these pricing requests will not provide the Commission with information that has "practical utility," *i.e.*, that can be used by the Commission to perform the regressions and resulting market analysis for which it purports to be collecting the information.[14] Most fundamentally, the location-specific prices sought by the proposed requests simply do not exist for most special access arrangements; instead, customers negotiate individual contracts that

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[10] *Notice*, App. A ¶¶ II.B.4-7 (pricing requests for incumbents); *id.* ¶¶ II.A.12-14 (pricing requests for competitive providers).

[11] *Id.* ¶ II.B.4 (requesting information "by rate element by circuit billed").

[12] *Id.* ¶ II.B.5 (requesting information "whether the adjustment applies to a single rate element," to "multiple circuits" or is "an overall adjustment that applies to every rate element on every circuit").

[13] *Id.* ¶ II.B.4 (27 sub-parts); *id.* ¶ II.B.5 (9 sub-parts).

[14] 44 U.S.C. § 3508 ("Before approving a proposed collection of information, [OMB] shall determine whether the collection of information by the agency . . . shall have practical utility.")

cover multiple locations and that offer "lump" discounts and credits applicable to a range of services (including services other than special access). There is no rational way to derive a non-arbitrary "by circuit" price from these contracts. In addition, the Commission would be faced with the enormous task of reconciling vast amounts of data that are inconsistent across providers and services. As a practical matter, the lack of location-specific prices, and the inconsistencies, gaps, and outliers among the various providers' pricing data would inevitably result in a data set that is not of "practical utility."

It is important to underscore a fundamental problem with the underlying conceit of the pricing data requests – that is, that the Commission can determine the "right" price for special access services, presumably so that it can then measure the prices it develops from the data in its regression analyses against that standard. There is no such "right" price. Prices go up and down in competitive markets, and vary from provider to provider, based on a range of considerations. More to the point, the notion that regulators can establish the "correct" rate for a service (or conclude that a rate is not "correct") flies in the face of decades of Commission (indeed, federal government) policy seeking to promote competition, because markets, not regulatory fiat, work best to set rates and benefit customers. For this reason as well, the notion that the Commission will require the industry to engage in an exhaustive effort to collect tens of millions of records in an ultimately pointless effort to determine the "right" price for special access services cannot be reconciled with the Commission's PRA obligations.

Second, and relatedly, the information could not be processed and used by the Commission in a "timely" fashion.[15] The Commission's proposed pricing requests are so

[15] *Id.* § 3502(11) ("the term 'practical utility' means the ability of an agency to use information, particularly the capability to process such information in a *timely* and useful fashion") (emphasis added).

complex, detailed, and burdensome, and the work that would be required to "process" the data for use in the proposed regression analyses is so daunting, that it could take years before the regressions would yield any "results" (and, as AT&T explained in its comments in response to the *Notice*,[16] any such results would, in any event, be meaningless given the lack of location-specific prices and the many other econometric obstacles to the proposed regressions). But by the time the Commission gathers and reconciles the data and develops regressions, the results would be out-of-date given the rapid changes in the special access marketplace that have recently occurred and that will continue to occur in the future, particularly as Ethernet and other less regulated services become pervasive.

Third, the requested pricing information is not "necessary for the proper performance" of the Commission's regulatory functions.[17] The proper goal of this proceeding is to determine reasonable proxies for sunk investment in competitive facilities. The location data from all providers is necessary to achieve that goal; the pricing data requested by the Commission is not and goes far beyond what is needed to revise the Commission's pricing flexibility rules.

Fourth, because the requested information does not satisfy the PRA's usefulness, timeliness and necessity requirements, it could not be lawfully collected even if the burden of compiling this information were relatively limited. In fact, however, providing meaningful responses according to the terms of the proposed pricing requests would be extraordinarily

[16] *See, e.g.*, AT&T Comments at 6-10.

[17] 44 U.S.C. § 3508 ("Before approving a proposed collection of information, [OMB] shall determine whether the collection of information by the agency is necessary for the proper performance of the functions of the agency . . . .").

burdensome to carriers.[18]

In this regard, the Commission's estimated response time of a mere 134 hours is wildly understated, even as an "average." The scope and detail of the proposed requests implicates millions of individual circuits and rate elements, and reconciling the separate network and billing systems in the manner needed to respond precisely to the many pricing request subparts is simply not practicable. Although the *Notice* seems to be premised on the notion that special access providers already possess, or can easily develop, automated systems that can manageably respond to the 36 sub-parts of data requested for each circuit provided over two years, this is not the case. To the contrary, AT&T's preliminary review shows that to the extent it is even possible to develop any meaningful responses for key elements of the requests, which may often not be the case, the data processing required would have to be done almost entirely manually. This is primarily because, as noted, lump sum and other discounts that apply across a region or across multiple services would somehow need to be allocated arbitrarily to individual locations. Thus, fully and accurately responding to the requests as proposed would entail manually determining how to apply discounts or other pricing adjustments and to which circuits and rate elements, as well as the "reason" for the discount, to millions of individual circuits and in each month of the 24 month time period covered by the requests – assuming, *arguendo*, that such an allocation can be performed in any rational manner. On its face, this would involve an inordinate amount of time; as an alternative, providers likely would be forced to resort to some workaround or shortcut in developing responsive information, which would undoubtedly compromise the accuracy of the data and the validity of the resulting regression analyses.

[18] *Id.* § 3501(1) (one of the PRA's principal purposes it to "minimize the paperwork burden . . . resulting from the collection of information by or for the Federal Government"); *see also Dole v. United Steelworkers of Am.*, 494 U.S. 26, 32 (1990) (Congress enacted the PRA in response to "[o]utcries" that regulated entities "were being buried under demands for paperwork").

The Commission has acknowledged that OMB might not approve some of the Commission's data requests,[19] and the pricing requests are exactly the type of burdensome and unnecessary data collection effort that does not pass muster under the PRA. The proper course in these circumstances is to drop these pricing requests now and proceed to collecting the more useful and necessary data regarding network facilities and demand.[20]

I. THE COLLECTION OF DATA ON ALL PROVIDERS' SPECIAL ACCESS FACILITIES SATISFIES THE PRA'S USEFULNESS, TIMELINESS AND NECESSITY REQUIREMENTS, BUT THE PROPOSED REQUEST FOR PRICING INFORMATION VIOLATES THE PRA.

The PRA was enacted to "enhance the public benefit of the information collection process" and, in particular, to "minimize the paperwork burden" resulting from federal data collection efforts.[21] Accordingly, an agency must obtain OMB approval before it can require the

[19] *See Notice* ¶ 52 n.111. The Commission delegated "limited" authority to the Wireline Competition Bureau to, *inter alia*, "make corrections to the data collection based on feedback received through the PRA process." *Id.* ¶ 52. This delegation certainly constrains the Bureau from making wholesale substantive changes to critical aspects of the data collection, and specifically the modifications proposed by some parties that would undermine the Commission's efforts to develop a full record of competitive facilities. At the same time, where, as with the pricing requests, the collection effort fundamentally implicates the requirements of the PRA, both the law and sound policy warrant making the necessary revisions to the data requests *before* they are submitted to OMB. Of course, insofar as the Commission determines to proceed with these pricing requests, it should ensure that it is obtaining relevant data from all providers and purchasers. To that end, the Commission should not modify the requests in the manner proposed by some parties, such as by imposing the burden of developing responsive information solely on the ILECs. *See, e.g.*, Letter of Steven F. Morris, NCTA, to Marlene Dortch, FCC, WC Docket No. 05-25, Attachment at 3 (proposed revisions) (Feb. 28, 2013) ("NCTA *Ex Parte* Letter") (advocating that the Commission "not burden purchasers" with a requirement to submit data concerning the services they purchase through ILEC tariffs).

[20] *Notice* ¶ 52 n.111 ("To the extent the Bureau cannot obtain Office of Management and Budget approval for some portion of the data collection, we direct the Bureau to proceed with the remainder of the collection"); *see also* Statement of Chairman Julius Genachowski (attached to *Notice* at 119) ("And we ensure that if a part of the collection doesn't receive OMB approval, the remainder can go ahead.").

[21] *Tozzi v. EPA*, 148 F. Supp. 2d 35, 38 (D.D.C. 2001); 44 U.S.C. § 3501(1).

submission of information.[22] OMB, in turn, should not approve an agency's data collection efforts unless the requested information satisfies the standards of the PRA. Under the PRA, OMB must determine whether proposed information collections are "necessary" for the "proper performance of the functions of the agency, including whether the information shall have practical utility."[23] The PRA defines "practical utility" as "the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion."[24] OMB's regulations further provide that "[p]ractical utility means the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account its accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects . . . in a useful and timely fashion."[25]

Under these standards, the core of the Commission's data requests – the data on special access providers' networks – satisfies the PRA, but the proposed pricing data requests do not. Accordingly, the Commission should eliminate those pricing requests from its data collection effort now, before submitting the package of requests to the OMB for review.

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[22] *See* 44 U.S.C. 3512; *see also Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 29-31 (D.C. Cir. 1998) (without OMB approval, an agency's data collection requests need not be followed).

[23] 44 U.S.C. § 3508; *see also Tozzi*, 148 F. Supp. 2d at 38 ("The OMB must determine whether the [information collection] request is necessary to enable the agency to function and of public utility.").

[24] *Id.* § 3502(11).

[25] 5 C.F.R. § 1320.3(l). *See also id.* ("In determining whether information will have 'practical utility,'" OMB must "take into account whether the agency demonstrates actual timely use for the information . . . to carry out its functions").

A. Information On The Facilities And Demand Of Special Access Providers Satisfies The PRA And Should Allow The Commission To Develop Administratively Workable Rules And To Verify Or Modify Its Proxies For Facilities Deployment.

The Commission's requests for data regarding the network facilities of all special access providers, and the demand for special access services, easily satisfy the PRA because such data is both necessary and practically useful for resolving the questions raised in this proceeding.

For the last decade, CLECs have contended that the Commission should modify the pricing flexibility rules on the basis of bare allegations that there are no facilities-based special access alternatives in the marketplace. The dispute, therefore, has centered on whether the Commission's existing pricing flexibility "triggers" are a reasonably accurate proxy for the existence of competitive, facilities-based networks. The Commission concluded last year that it did not have enough information to determine scope of such sunk facilities, and it suspended operation of the pricing flexibility rules while it collected data to determine how well the existing or alternative triggers predicted actual competitive deployment.[26] Accordingly, the Commission *must* follow through with the collection of data on the location of competitive facilities and special access demand; such data is clearly "necessary" and "practically useful" to resolve what has always been the central dispute in this proceeding.

Indeed, as the *Notice* recognizes, the goal of this proceeding is to develop administrable and workable triggers, based on readily observable facts, that reasonably identify circumstances where partial deregulation of ILEC special access services is appropriate.[27] Under basic economic principles that have been established at the Commission for years and approved in

[26] *Pricing Flexibility Suspension Order* ¶¶ 3-7.

[27] *See Notice* ¶ 78 (noting "the importance of balancing the accuracy of our analysis with the need for administrative efficiency" and that the Commission intends to identify "proxies for special access competition, which could be employed going forward to evaluate petitions for pricing flexibility in a consistent, streamlined manner").

court, the Commission can base the level of regulation of special access services on the extent to which alternative providers have made sunk investment in network facilities capable of providing dedicated access services to customers served by the incumbent. Such investment ensures that ILECs and new entrants will compete on price and other terms, because an incumbent has little hope of driving its competitors out of the market through exclusionary conduct where competitors have made sunk investments in alternative facilities.[28]

In light of these basic and incontrovertible principles, the Commission's effort to collect data on all providers' special access facilities and demand would have obvious "practical utility," because it will allow the Commission to test the accuracy of its existing triggers for pricing flexibility. If an empirical analysis shows that the existing triggers are so under- or over-inclusive that they cannot be used as a reasonable, rough proxy for competitive investment, then the Commission can use the facilities-related data it proposes to gather to determine whether a better, readily observable proxy exists for predicting where facilities-based competition exists. The Commission has already requested and collected this type of facilities-related data at earlier stages of this proceeding,[29] and the PRA poses no obstacles to the similar mandatory data collection effort the Commission now proposes.

Nevertheless, in recent *ex parte* filings, some entities have suggested that the Commission's requirement that competitive providers map the routes of their special access

[28] Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd. 14221, ¶ 80 (rel. Aug. 27, 1999) ("*Pricing Flexibility Order*"), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001) ("the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed," because "that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market").

[29] *See* FCC, Public Notice, *Data Requested in* Special Access NPRM, 25 FCC Rcd. 15146 (rel. Oct. 28, 2010); FCC, Public Notice, *Competition Data Requested in* Special Access NPRM, 26 FCC Rcd. 14000 (rel. Sept. 19, 2011).

network facilities is too burdensome and that, in lieu of information that would actually allow the Commission to determine the extent of competitors' facilities, these providers should only have to provide "existing maps" (presumably readily-available maps that may not be up to date), "airline-view" stick-level maps, or even a simple list of their "headend locations and customer locations."[30] These attempts to limit the facilities data that is to be submitted would prevent the Commission from accurately gauging competition. As the Commission explained, the submission of "maps of the routes followed by fiber" owned or leased by competitors (including nodes and connections) will "indicate where competitive providers can provide, or could potentially provide, special access services."[31] Paring back the request in the manner some entities have proposed would permit, for example, a competitor merely to inform the Commission that it has a node or headend at one specific location and serves several large businesses there, but not provide data showing that it in fact has a fiber ring that extends through the entire area from which it can serve most or all of the numerous nearby businesses.[32] Any claim that competitive providers do not know with relative precision the routes of their fiber – or could not provide this information without "expensive site visits"[33] – should be viewed

[30] *See, e.g.*, NCTA *Ex Parte* Letter at 3 and Attachment at 1; Letter from Nancy Lubamersky, TelePacific Communications, to Marlene Dortch, FCC, WC Docket No. 05-25, at 1 (March 25, 2013).

[31] *Notice* ¶ 37.

[32] For example, limiting the scope of the requests for detailed maps and facilities data could permit a competitor to indicate simply that it has a node or headend located at 14th and M, Streets, NW, in Washington, D.C., and serves two hotel customers at 10 Thomas Circle and 1400 M Street. If that same competitior, however, owns a fiber ring that runs all the way down M Street, west to 22nd Street, and then back east on L Street, the more limited response would fail to capture that facilities deployment – and the fact that competitor's fiber could easily be extended to serve (at the very least) most or all of the numerous businesses on those stretches of M and L Streets. Indeed, allowing that competitor to provide only the more limited data might make it appear that the fiber could be used to serve just those businesses surrounding Thomas Circle.

[33] NCTA *Ex Parte* Letter, Att. at 1.

skeptically. But even if there is some burden associated with developing this information, it plainly is outweighed by its importance to the objectives of this proceeding. Accordingly, the Commission should proceed with its request for detailed maps (or detailed geocode data) from competitive providers showing the actual routes of their fiber. Indeed, deleting or even circumscribing this request in the manner proposed by other entities would adversely affect the "practical utility" of the entire collection effort.

B. The Pricing Data The Commission Proposes To Collect Fails To Satisfy The PRA Because It Cannot Be Practically Used In A Timely Fashion And Is Not Necessary In Order For the Commission to Adjust Its Rules.

By contrast, the Commission's burdensome proposal to collect highly detailed, circuit-specific pricing data fails to satisfy the PRA because such data (1) are not practically useful, (2) cannot be used in a timely manner, and (3) are not necessary to resolve the issues raised in this proceeding.

1. The Pricing Information Would Not Be Practically Useful To The Commission.

The pricing information that the Commission proposes to collect squarely flunks the "practical utility" and "usefulness" requirements of the PRA. The Commission intends to use these data to undertake a complex "multi-faceted market analysis" comprised of "panel regressions designed to determine how the intensity of competition (or lack thereof), whether actual or potential, affects prices, controlling for all other factors that affect prices."[34] In fact, however, there are numerous problems with attempting to compile and then use the requested pricing data in the manner proposed by the Commission.

[34] *Notice* ¶ 68; *see id.* ¶ 67 (claiming that regressions will "determine where and when special access prices are just and reasonable, and whether [the Commission's] current special access regulations help or hinder this desired outcome").

The fundamental problem is that the prices that the Commission is seeking – namely, special access prices broken down "by rate element [and] by circuit billed"[35] – simply do not exist in the marketplace. As explained in more detail in AT&T's comments, special access providers typically do not sell special access "by circuit" or "by rate element" due to the manner in which contracts are negotiated, particularly with respect to the large customers that account for the bulk of their business.[36] Specifically, "[s]pecial access tariffs and contracts routinely cover multiple locations and provide uniform prices, discounts, and credits," and also routinely cover multiple services in addition to special access services, including unregulated services.[37] With these bundled contract offerings, there simply are no meaningful "by circuit" or "by rate element" special access prices that providers can collect and report.

Further, any attempt to derive "by circuit" prices in these circumstances would be a wholly artificial and arbitrary exercise. In many contracts, the parties have negotiated year-end customer credits (*i.e.*, rebates) that depend upon the customer's annual aggregate purchases of all of the services – including services other than dedicated special access – and locations covered by the agreement.[38] Such contract-wide discounts could not be allocated to individual circuits or rate elements – much less to individual services or locations – in any non-arbitrary way. In addition to such year-end credits and adjustments, customers often receive various credits and adjustments to their bills throughout the contract period to address particular issues and resolve

[35] *Notice*, App. A ¶ II.B.4.

[36] AT&T Comments at 25-26 (citing Igal Hendel and Mark A. Israel, *Econometric Principles That Should Guide The Commission's Analysis of Competition for Special Access Services* ¶¶ 29-33, 56-58 (Feb. 11, 2013) ("Hendel-Israel Decl.") (Attachment A to AT&T Comments)).

[37] *Id.* at 25; *see also* Hendel-Israel Decl. ¶¶ 30-31.

[38] *See id.* (citing Hendel-Israel Decl. ¶ 32).

disputes. Like the year-end credits, these credits and adjustments often cannot be attributed to individual circuits or rate elements.

Thus, the special access prices that the Commission seeks to have service providers collect and report do not exist and cannot be accurately derived. Indeed, trying to ascertain the price of a type of special access circuit, by rate element, in a single location is no more feasible than trying to determine the current route-specific price of a long distance call between, for example, New York and Los Angeles. At one time, long distance carriers tariffed a specific, per-minute rate that varied based on geography, making it relatively easy to compare prices between carriers for toll calls between two cities. Now, however, carriers use contracts that typically either charge a flat-rated amount for unlimited long distance calls and/or bundle long distance services with other services, such as local calling, broadband, or video. In these circumstances, it makes no sense to ask a service provider offering a bundled, flat-rated plan for the "price" of a long distance call between two locations. The same is true here of the Commission's request for "by circuit" and "by rate element" special access pricing on a location specific basis. Trying to separate out the price of each specific circuit at each location invites arbitrary divisions of packages of services. Thus, requiring special access providers to collect pricing for their services on a circuit-by-circuit, location-by-location basis is an exercise in futility, and cannot yield anything of "practical utility," as required by the PRA.

The Commission's request here is especially impractical in light of the fact that, before it could even consider using the data, the Commission would have to reconcile enormous volumes of inconsistent records provided by different companies. As AT&T explained, billing records are "'notoriously messy'" and companies maintain these records in "different and incompatible

formats" due to company-specific reporting conventions and practices.[39] As a result, the pricing data reported by companies is likely to contain "thousands of anomalies and inconsistencies," such as unexplained gaps and outliers (such as unusually high or low prices).[40] The Commission would have to undertake a lengthy process of "scrubbing" the data, and the need to do so for tens of millions of records would cast serious doubt on the reliability and practical utility of the resulting data set. Moreover, attempts to identify circuit-specific and location-specific prices would involve dozens of allocations and assumptions. There is no practical way for the Commission to ensure consistency among those myriad assumptions because the circumstances underlying each one will vary, for reasons ranging from when the customer executed the contract, to when any discounts are applied, to the types of services (regulated and unregulated) that are covered by the contract.

But the impracticality of using these pricing data goes far deeper, because they are subject to a number of additional sources of inconsistency and irreconcilability. For example, ILECs and CLECs use fundamentally different rate elements that are not easily compared; the Commission's Part 61 and 69 rules require ILECs to charge separately for transport and channel terminations (and include mileage charges for transport as well), but CLECs face no such constraints and do not divide their circuit charges in this way.[41] Similarly, because pricing flexibility is granted separately for interoffice transport and channel terminations, different components of ILECs' prices can be subject to different degrees of price regulation, which

[39] *Id.* at 22 (quoting Hendel-Israel Decl. ¶ 44).

[40] *Id.*

[41] *See* AT&T Comments at 22-23; Hendel-Israel Decl. ¶¶ 57-58.

makes ILEC-CLEC comparisons even more difficult.[42] Ethernet services are priced on yet a different basis (typically with a recurring port charge and recurring charge for committed throughput, and with additional price variation depending on service quality levels), making direct comparisons between Ethernet and DSn services impractical.[43] For all of these reasons, the pricing data the Commission requests simply does not exist in any form that would permit the Commission to make "practical use" of it in the form of regression analyses of location-by-location pricing differences.

Notably, OMB disapproved an information collection request in the Commission's emergency backup power proceeding that posed similar problems.[44] In that disapproval, OMB found that the Commission had not demonstrated the practical utility of the information because of "the expected volume of submitted reports" and "the non-standardized format the information will be submitted in."[45] These threshold problems are, if anything, worse here, and therefore would preclude a finding by OMB that the pricing information that the Commission seeks to collect would be practical or useful.

2. The Commission Could Not Analyze, On A Timely Basis, The Pricing Information It Proposes To Collect.

The Commission also could not process and analyze the requested pricing information in a "timely" fashion, as the PRA requires. One of OMB's grounds for disapproving the

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[42] *See* AT&T Comments at 23 (citing Hendel-Israel Decl. ¶¶ 57-58 (rate structure disparities will "create difficulties in model specification" and "create[] additional complexity for any regression using price as the dependent variable")).

[43] *See id.* at 22-23; Hendel-Israel Decl. ¶¶ 57-58.

[44] *See* Notice of Office of Management and Budget Action, *Information Collection Regarding Emergency Backup Power for Communications Assets as Set Forth in the Commission's Rules (47 CFR 12.2)*, ICR Reference Number 200802-3060-019 (Nov. 28, 2008) ("Emergency Backup Power PRA Disapproval"), *available at* http://www.reginfo.gov/public/do/DownloadNOA?requestID=212660.

[45] *Id.* at 1.

Commission's information collection request in the emergency backup power proceeding was that the information "is subject to potential change before the FCC can process it."[46] The same is true here. The special access marketplace is undergoing a rapid and irreversible transformation from TDM-based DSn service to packet-switched Ethernet service. Given these fundamental technology-driven changes, the practical utility of the historical pricing information that the Commission seeks to collect for developing forward-looking rules is highly questionable.[47] The historical pricing information that the Commission seeks will be outdated by the time the Commission processes it and completes its analysis, if it is not outdated already.

Further, the scope of the Commission's pricing data requests is massive. The requests seek highly granular pricing information from numerous carriers on a nationwide basis, and require them to report it for each month of a two year reporting period. This will result in tens of millions of data points that the Commission will have to process. As noted, substantial clean-up will be required in order to reconcile the non-uniform information reported by different companies, and to address gaps and inconsistencies in the reported information. In all likelihood, it will take many months for the Commission to compile all of this information and produce a complete and useable data set.

Only then could the Commission begin the job of formulating its proposed regression analyses, a task that it admits would have to await receipt of the information.[48] The process of formulating, running, and interpreting the results of the regressions would be a lengthy one, particularly because the running of multiple regressions would necessarily be an "iterative

[46] Emergency Backup Power PRA Disapproval at 1.

[47] AT&T Comments at 29-30.

[48] *Notice* ¶ 68 (noting that "[t]he precise form of econometric modeling will be dependent, in large part, on the nature and the quality of the data produced").

process,"[49] and because accepted professional practice requires that the Commission conduct its modeling and analysis in a transparent manner.[50] This would require rigorous peer review and "a procedure that facilitates comments by interested parties *at each step of the process*."[51] This course of action will also require many months. Given the rapidity with which the special access marketplace is changing, an analysis of historical *pricing* behavior would merely capture a snapshot of past market dynamics that would have little or no relevance for any forward-looking rules. The PRA is designed to prevent precisely this sort of enormous data compilation exercise that, upon its completion, offers little prospect of contributing a practical benefit to the core objectives of this proceeding.

3. Collection Of This Massive Amount of Pricing Data Is Not Necessary To Evaluate the Commission's Pricing Flexibility Rules.

Finally, the Commission's proposed pricing information requests would not comply with the PRA because none of this pricing information is "necessary" for any legitimate regulatory purposes. As noted, the primary goal of this proceeding is to determine whether the Commission's pricing flexibility rules are working as intended. That task, as AT&T demonstrated,[52] does not require the collection of special access prices on a "by circuit" basis. Instead, it requires the collection of detailed information about location-specific demand for special access services, as well as detailed information about the network facilities of competitive providers that are capable of serving special access customers. The Commission has requested such facilities and demand information in its data collection request, and this

[49] Hendel-Israel Decl. ¶ 39.

[50] *See id.* ¶¶ 35-40.

[51] *Id.* ¶ 39 (emphasis in original); *see also id.* ¶ 36 ("All aspects of analysis – from processing of raw data through final regression results – are generally subject to review by other experts.").

[52] AT&T Comments at 10-19.

information clearly satisfies the requirements of the PRA and will allow the Commission to observe where competitors have sunk investment in network facilities capable of serving special access customers.

The Commission, however, also seeks to collect granular pricing information as part of a plan to conduct a complex "multi-faceted market analysis" based on numerous panel regressions.[53] AT&T demonstrated that this analysis would be tantamount to a full dominance/non-dominance inquiry because it would focus on "the sources of . . . market power" and the impact of various marketplace factors on location-specific special access "prices."[54] Indeed, the proposed nationwide panel regressions would be far more complex than any inquiry the Commission has ever conducted in prior non-dominance proceedings.

A market power/dominance inquiry would go far beyond what is necessary in this proceeding. A nondominance inquiry is designed to determine whether complete exemption from the whole host of dominant carrier regulations is warranted, based on the presence of full market competition. The disagreement in this proceeding over the past decade, in contrast, has focused on whether the readily observable "proxy" that the Commission adopted for sunk network investment – fiber-based collocations – has proven to be a reasonably accurate predictor of competitive network deployment in those areas where there is significant special access demand. That is, the disagreement has focused on the efficacy of the current pricing flexibility rules, which seek only to provide a measure of regulation *within the context of overarching dominant carrier regulation*. The broader and more complex market power analysis for which the Commission seeks pricing information therefore goes far beyond what is necessary to

[53] *Notice* ¶ 68.

[54] *Id.* ¶ 67; *see* AT&T Comments at 20.

conduct that inquiry and, moreover, is unlikely to yield any results that would be useful in fashioning a new, easily administrable pricing flexibility test.

II. THE COLLECTION OF THE DETAILED SPECIAL ACCESS PRICING INFORMATION REQUESTED IN THE PROPOSED DATA REQUESTS WOULD BE EXTRAORDINARILY BURDENSOME.

Given both the fact that millions of special access circuits are implicated by the data collection effort, and that the pricing data requests by their terms involve the development of highly detailed information for each of those circuits –a substantial portion of which work can only be accomplished manually – those pricing requests plainly would impose significant burdens on providers. The Commission's claim that the average response time for its proposed data requests is a mere 134 hours[55] is far off the mark. Indeed, AT&T's initial assessment is that developing the information necessary to fully and accurately respond to just a few of the 36 sub-parts encompassed in two of the Commission's proposed requests would require a manual processing effort that is inherently impracticable.[56]

This extraordinary undertaking would be plainly contrary to one of the principal purposes of the PRA, which is to "minimize the paperwork burden . . . resulting from the collection of information by or for the Federal Government."[57] The term "burden" is broadly defined to include all of the "time, effort, or financial resources expended by persons to generate, maintain,

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[55] *See Federal Register Notice*.

[56] One carrier has estimated that the time required to comply with the entire data request "will be about 40,000 hours." Letter from Melissa E. Newman (CenturyLink) to Marlene H. Dortch (FCC) (Jan. 10, 2013).

[57] 44 U.S.C. § 3501(1); *see also id.* § 3504(c)(3) (OMB Director shall "minimize the Federal information collection burden, with particular emphasis on those individuals and entities most adversely affected"); *Dole*, 494 U.S. at 32 (Congress enacted the PRA in response to "[o]utcries from small businesses, individuals, and state and local governments, that they were being buried under demands for paperwork"); *Tozzi*, 148 F. Supp. 2d. at 38 ("The PRA was enacted to reduce and streamline the administrative burden created by the superfluous paperwork resulting from government information collection requests.")

or provide information to or for a Federal agency."[58] OMB's regulations list several activities that must be considered when determining the burden associated with a particular information collection including: "[t]raining personnel" to respond to the collection;[59] "[d]eveloping, acquiring, installing, and utilizing technology and systems" to collect, validate and process information;[60] "[s]earching data sources";[61] and "[c]ompleting and reviewing the collection of information."[62] All of these types of burdens will be incurred if special access providers are ordered to comply with the proposed pricing requests.

AT&T's preliminary review shows that the burden associated with complying with the strict terms of the proposed pricing requests, and particularly with those portions of the requests that seek to associate adjustments to prices with specific circuits, would be overwhelming. During the 24 month period covered by the proposed data collection effort (all of 2010 and 2012), AT&T offered nearly 50 different classes of special access services and provisioned millions of individual circuits across all of its ILEC territories. This poses a challenge even for the pricing data the Commission is requesting that initially could be compiled by running mechanized data queries.[63] Developing, running, and testing those queries itself would be a complex task – and, of course, the results would need to be manually verified. For example, AT&T would need to develop queries for each of its five regions, which in turn would need to be run against *16 different billing tables*. And additional queries into various network provisioning and other databases also would have to be conducted.

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[58] *Id.* § 3502(2).

[59] 5 C.F.R. § 1320.3(b)(1)(vi).

[60] *Id.* § 1320.3(b)(1)(ii)-(iii).

[61] *Id.* § 1320.3(b)(1)(vii).

[62] *Id.* § 1320.3(b)(1)(viii).

[63] *See, e.g.*, *Notice*, App. A, ¶¶ II.B.4.a-g, l-u.

This mechanized work by itself is complex and substantial, but it pales in comparison with the effort associated with the vast amounts of manual processing that would need to occur, primarily to answer the sub-parts of the data requests relating to discounts, adjustments, and other credits.[64] As stated above, there does not appear to be any non-arbitrary way for lump-sum, region-wide, or multi-service discounts to be applied to individual circuits. But even assuming, *arguendo*, that such a method could be developed, the actual work required to provide data that is fully and accurately responsive to the requests about, *inter alia*, whether a particular circuit is subject to a volume or revenue commitment, the "scope" of the adjustment, the amount of the discount, and the "reason" for the adjustment, would require teams of people to engage in the manual review of tens of millions of billing records.[65]

This is not a process that can be mechanized. Billing adjustments are most often made at the customer level or at a contract level (spanning a large portion of individual circuits) – in other words, in a "top-down" manner, and not in a "bottom up," circuit level manner. Accordingly, to provide the data contemplated in the proposed requests, AT&T employees would need to correlate every adjustment to a specific contract number and review the terms of the contract, as well as read the notes on the customer bill, in order to determine the basis and scope of the adjustment (and this again assumes, contrary to fact, that the actual amount of the adjustment for individual circuits could then be derived in a non-arbitrary way).

Obviously, it simply is not feasible for providers to undertake such a process. Instead, if the requests stood in their present form, providers likely would have to employ some workaround or shortcut to approximate the information sought in these subparts of the request or

[64] *E.g.*, *Notice*, App. A, ¶¶ II.B.4.v-aa; II.B.5.b-i.

[65] Indeed, even determining the beginning and end date of an adjustment can involve significant manual work because AT&T's billing systems often include only a beginning date, and further manual investigation would need to be performed to determine the end date of the credit.

perhaps even just submit a "data dump" of the gross billing information. But the problem posed by the pricing data requests cannot be cured through such shortcuts or even simply by excising the subparts of the requests that would entail significant manual intervention. Obviously, either approach would result in a compromised data set and even more deeply flawed regression analyses. The only correct solution under the PRA is to eliminate the set of pricing questions in its entirety. Especially in view of the significant time and resources that companies will have to devote to complying with the legitimate portions of the data requests, those companies should not be subjected to the additional, significant burdens involved in collecting pricing information that lacks practical utility and is not necessary to the resolution of this proceeding.

CONCLUSION

For the foregoing reasons, the Commission should affirm that the facilities and demand data requests satisfy the PRA, but conclude that the pricing data requests (set forth in the *Notice*, App. A, ¶¶ II.B.4-7; *id.* ¶¶ II.A.12-14) violate the PRA. Accordingly, the pricing requests should be withdrawn.

Respectfully submitted,

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