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February 11, 2008

The Honorable Tony Clark
Chairman, Telecom Committee
North Dakota Public Service Commission
State Capitol, 600 East Boulevard Avenue, Dept 408
Bismarck, North Dakota 58505-0480

The Honorable Daryl Bassett
Vice Chair, Telecom Committee
Arkansas Public Service Commission
1000 Center Street
Little Rock, Arkansas 72203-0400

The Honorable James H. Cawley
Vice Chair
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, Pennsylvania 17120

The Honorable Phillip Jones
Commissioner
Washington Utilities and Transportation Commission
Chandler Plaza, Post Office Box 47250
Olympia, Washington 98504-7250

The Honorable Monica Martinez
Commissioner
Michigan Public Service Commission
6545 Mercantile Way
Post Office Box 30221
Lansing, Michigan 48909-7721

The Honorable Maureen F. Harris
Vice Chair, Telecom Committee
New York Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

The Honorable John D. Burke
Commissioner
Vermont Public Service Board
112 State Street, 4th Floor
Montpelier, Vermont 05620-2701

The Honorable Orjiakor N. Isiogu
Chairperson
Michigan Public Service Commission
6545 Mercantile Way
Post Office Box 30221
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The Honorable Steve Kolbeck
Commissioner
South Dakota Public Utilities Commission
State Capitol, 500 East Capitol
Pierre, South Dakota 57501-5070

The Honorable Randy Mitchell
Commissioner
South Carolina Public Service Commission
Post Office Drawer 11649
101 Executive Center Drive
Columbia, South Carolina 29211

Dear Commissioners:

COMPTEL understands that, as part of the National Association of Regulatory Utility Commissioners' ("NARUC") ongoing work to examine the competitive issues involving special access (also referred to as "dedicated access") and as outlined in a

resolution calling for the study of special access and the formation of a special access task force adopted at its 2007 Winter Meetings, NARUC is considering a proposal recently submitted by NRRI in furtherance of these goals. Special access is at least a \$16 billion service industry,¹ the price and quality of which impacts virtually all other industries including national defense. Examination of the competitiveness of this market is undeniably worth the requisite resources.

COMPTEL would also like to take this opportunity to respond to the January 29, 2008 letter submitted by the United States Telecom Association (“USTA”). USTA alleges that the data ILECs have submitted to the Federal Communications Commission (“FCC”) and the Government Accountability Office (“GAO”) show that there is “no need for additional special access regulation” and that prices for special access are declining in areas subject to the pricing flexibility regime. However, on the contrary, the GAO concluded the following in its report on the special access service market:

“The data developed in this report indicates that there are *fewer competitive alternatives* and that *prices for dedicated access in the theoretically more competitive phase II markets are higher on average* than prices in phase I markets, and not statistically different than prices in price-cap markets. The report also demonstrates that the *FCC does not have the type of meaningful data* that would allow it to effectively oversee the extent of competition in the market.”²

USTA argues that it does not matter that ILEC list prices for special access services in the Phase II markets are exorbitant because they offer discount plans. As the GAO clarifies, however, “most of these contracts provide overall discounts off the list price, and, therefore, since price-flex list prices are higher on average than price-cap list prices, prices will remain higher in Phase II areas.”³ Likewise, the United States Department of Defense and all other Federal Executive Agencies (“DOD/FEA”), in comments submitted in state proceedings, explain that since contract rates are linked to the retail rates, increases in retail rates result in increases in contract rates.⁴ Furthermore,

¹ “FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services,” GAO-07-80 Deregulation of Access Services, p.44, November 2006 (“GAO Report”).

² *Id.* at 44-45 (*emphasis added*). See also, Letter of Colleen Boothby of Levine Blaszak, Block and Boothby, on behalf of Ad Hoc Telecommunications Users Committee (“Ad Hoc”), to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-74, filed Dec. 1, 2006. [Ad Hoc outlines the market conditions revealed by the GAO Report, demonstrating that the level of competition for special access services is insufficient to constrain the BOCs market power relative to those services and that prices in Phase II pricing flexibility areas are higher than they would have been had those prices remained subject to some form of FCC price regulation.]

³ GAO Report at 13-14.

⁴ *Tariff Filing of Verizon New York to Implement Pricing Flexibility for Non-Basic Services*, N.Y. Pub. Serv. Comm’n, Case No. 06-C-0897, Initial Comments of the United States Department of Defense and All Other Federal Executive Agencies, at 4 (filed Oct. 22, 2007)(“DOD/FEA NY Comments”). See Also, *Application of Verizon Virginia Inc. and Verizon South Inc. for a Determination that Retail Services Are*

USTA ignores that even the discounted rates are excessive when compared to objective measures such as cost or retail rates for comparable services, whether retail broadband or unbundled network element pricing.

More importantly, what USTA fails to mention is that in order to obtain these discounts, purchasers must agree to anti-competitive and exclusionary terms. The key feature of these discount plans is that in order to get “discounts” on circuits for which a purchaser has no competitive alternative (the vast majority of circuits), the purchaser must commit to purchasing the majority of their total circuit demand from the ILECs – including circuits for which a cheaper competitive alternative may be available. Another feature of these contracts that allows ILECs to effectively tie up the market is the prevalent requirement that customers who cannot meet their volume commitments are required to either pay high penalties or pay the grossly inflated rates from which the discounts are applied. In a competitive market, ILECs would not be able to extract these outrageous terms and conditions from its customers.

These terms and conditions are anticompetitive since they prevent a customer from migrating its service to a competitor that enters a market, and therefore prevent competition from developing, regardless of whether or not competitors otherwise have facilities or desire to compete. This is why the CLEC data on network facilities, which the ILECs repeatedly ask for, is irrelevant.⁵ Even if the CLECs had the facilities to compete in discrete geographic areas, they do not have the scale and scope to compete with the three predominant ILECs for the major purchasers of special access. The list price, therefore, is highly relevant to the state of competition.

The impact of these contract terms and conditions, and the lack of effective competitive alternatives, is prevalent in the comments that special access consumers submitted in the special access proceeding before the FCC. They repeat a common theme – that they have no alternative to the ILEC for the vast majority of their demand. For example, PAETEC Communications stresses that its dependence on ILEC special access services is rising and exceeds 98 percent in Phase II areas despite vigorous and concentrated efforts by PAETEC to find alternative special access providers.⁶ In a

Competitive and Deregulating and Detariffing of the Same, Virginia State Corp. Comm’n, Case No. PUC-2007-00008, Post-Hearing Brief of the United States Department of Defense and All Other Federal Executive Agencies (filed Sept. 14, 2007).

⁵ GeoResults - which Verizon, AT&T and other ILECs have relied on in other proceedings – provide data on CLEC facilities and demonstrate the lack of facilities-based competition. Letter of Brad E. Mutschelknaus of Kelly Drye and Warren, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 06-172, 07-97, 06-125, 06-147, and 04-440, filed Oct. 1, 2007. “The evidence presented here by Joint CLECs demonstrates that competitors have spent enormous sums of money to build networks, but these networks only serve – or are capable of serving in a commercially reasonable period of time – an extremely small portion of buildings in each local market at issue.” *Id.* at 8.

⁶ Comments of PAETEC Communications, *In the Matter of Special Access Rates for Price Cap Local Exchange Carrier*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, at 5-6 (filed Aug. 8, 2007; *See also*, Comments of Sprint Nextel, *In the Matter of Special Access Rates for Price Cap*

proceeding to consider state pricing flexibility before the New York State Public Service Commission, the DOD/FEA – a major consumer of enterprise telecommunication services - affirms that “Enterprise users such as federal agencies need more competition for retail services...competition has not been sufficient to limit Verizon’s pricing power.”⁷ Indeed, the DOD/FEA found that Verizon has increased charges for services to its business users in New York City – an area expected to be highly competitive.

Ignoring these two primary competitive indicators – price and market share – USTA instead raises the “quantity” of data ILECs have submitted to the FCC, in particular, maps and other evidence allegedly showing the existence of extensive competitive facilities, as well as theories on the impact of “wireless technology.” In this instance, quantity does not equal quality. In its decision on the recent *Verizon Forbearance Petitions*, the Commission explicitly states that it did not find persuasive any of the competitive fiber network data that Verizon had filed, including fiber network maps; the number of route miles on these networks; nor the number of wire centers in an MSA that a competing fiber can reach.⁸ Indeed, the Commission finds that the record shows that much of the competition from competitors for enterprise services, for the MSAs at issue in that proceeding, depends on Verizon’s facilities.⁹ Finally, the DOD/FEA and others also refute the idea suggested by USTA that wireless or other intermodal telecommunications services represent a viable substitute for traditional landline offerings of the ILECs.¹⁰ Fixed wireless network providers have only a minute fraction of the presence of the ILECs’ special access services and providers face significant barriers to expansion.¹¹

Local Exchange Carrier, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, at 30 (filed Aug. 8, 2007)[“In Phase II price flexibility areas: 97.2% of all Sprint Nextel’s DS1s were purchased from the incumbent LEC.”]

⁷ DOD/FEA NY Comments at 4.

⁸ *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, WC Docket No. 06-172, FCC 07-212, ¶ 40 (2007)(“Verizon Forbearance Petitions”).

⁹ *Id.* at ¶ 37.

¹⁰ DOD/FEA NY Comments at 13 (concurring with the ETI Report which states: “...Intermodal telecommunications services do not represent a viable *substitute* for the traditional landline offerings of the incumbent local exchange carriers and, as such, do nothing to diminish or to constrain the market power of the incumbent provider...”). For example, reduced security because of the ability of other parties to monitor wireless transmission is an important consideration. *Id.* at 14.

¹¹ Reply Comments of XO Communications, LLC, *et al*, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, pp. 24-26 (filed Aug. 15, 2007).

COMPTEL appreciates NARUC's resolve to examine this important issue. The states have a critical role to play in ensuring that customers benefit from true competition, and that dominant players are not able to exploit their dominance over bottleneck facilities. Please let us know if we can be of assistance.

Respectfully,

/s/ Karen Reidy

Karen Reidy
Vice President, Regulatory Affairs

cc: Charles Gray
James B. Ramsey