

Dated: November 16, 2009.

**J Scott Gordon,**

*Acting Regional Administrator, Region 4.*

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 0, 1, 61 and 69

[WC Docket No. 05-25; RM-10593; DA 09-2388]

#### Parties Asked To Comment on Analytical Framework Necessary To Resolve Issues in the Special Access Notice of Proposed Rulemaking

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document invites interested parties to comment on the appropriate analytical framework for examining the various issues that have been raised in the rulemaking proceeding on special access services pending before the Commission.

**DATES:** Comments are due on or before January 19, 2010 and reply comments are due on or before February 17, 2010.

**ADDRESSES:** You may submit comments, identified by WC Docket No. 05-25 and RM-10593, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Federal Communications Commission's Web site: <http://fjallfoss.fcc.gov/ecfs2/>. Follow the instructions for submitting comments.
- E-mail: [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and include the following words in the body of the message: "get form." A sample form and directions will be sent in response.

- First-class or overnight U.S. Postal Service mail: Secretary, Federal Communications Commission, 445 12th Street, SW., Washington DC 20554.

Detailed instructions for submitting comments, including how to submit comments by hand, messenger delivery or by commercial overnight courier, and additional information on the rulemaking process are contained in the **SUPPLEMENTARY INFORMATION** section of this document.

#### FOR FURTHER INFORMATION CONTACT:

Marvin Sacks, Wireline Competition Bureau, Pricing Policy Division (202) 418-2017, [marvin.sacks@fcc.gov](mailto:marvin.sacks@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Public Notice, DA 09-2388, released on November 5, 2009. The full text of this

document is available for public inspection during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Washington, DC 20554 and may be viewed on the Commission's Web site at <http://www.fcc.gov/>.

Pursuant to the Commission's rules governing notices of proposed rulemakings, 47 CFR 1.415, 1.419, the Commission invites interested parties to comment on an appropriate analytical framework for examining the various issues raised in the *Special Access NPRM*, 70 FR 19381, April 13, 2005. The term "special access services" encompasses all services that do not use local switches; these include services that employ dedicated facilities that run directly between the end user and an IXC's point of presence, where an IXC connects its network with the LEC network, or between two discrete end user locations. In the *Special Access NPRM*, the Commission explained that an examination of the current state of competition for special access facilities is critical to determine whether the Commission's pricing flexibility rules have worked as intended. The Commission invited comment on whether the available data and actual marketplace developments support the predictive judgments that underlie the special access pricing flexibility rules. 47 CFR 69.701 *et seq.* In addition, the Commission sought comment on appropriate measures to ensure that price cap rates for special access services remain just and reasonable after expiration of the CALLS Plan. Subsequently, in the *Special Access Refresh the Record PN*, 72 FR 40814, July 25, 2007, the Commission sought updated information on these issues, and parties continue to provide their views to Commission staff.

Some parties assert that the Commission's current rules are working as intended and contend there is extensive actual and potential competition in the market for special access. Other parties assert that there is little or no competition for special access services, and the current pricing flexibility and price cap regulations have resulted in supracompetitive prices and significant overearning by incumbents. The Commission would benefit from a clear explanation by the parties of how it should use data to determine systematically whether the current price cap and pricing flexibility rules are working properly to ensure just and reasonable rates, terms, and conditions and to provide flexibility in the presence of competition.

Therefore, in the Public Notice, the Commission seeks concrete suggestions

on the appropriate analytical framework for determining whether the current rules are working. For example, should the Commission use a market power analysis to assess the current special access regulatory regime? Suggestions should be both analytically rigorous (i.e., fact-based and systematic) and administratively practical (i.e., requiring a manageable amount of data collection and analysis). Once the Commission adopts an analytical approach enabling a systematic determination of whether or not the current regulation of special access services is ensuring rates, terms, and conditions that are just and reasonable as required by the Act, 47 U.S.C. 201(b), it can determine what, if any, specific problems there are with the current regime and formulate specific solutions as necessary. The analytical framework that parties propose should address how to answer key questions raised in the *Special Access NPRM*, including:

1. Do the Commission's pricing flexibility rules ensure just and reasonable rates?

(A) Are the pricing flexibility triggers, which are based on collocation by competitive carriers, an accurate proxy for the kind of sunk investment by competitors that is sufficient to constrain incumbent LEC prices, including for both channel terminations and inter-office facilities?

(B) If so, are the triggers set at an appropriate level?

2. Do the Commission's price cap rules ensure just and reasonable special access rates?

3. Do the Commission's price cap and pricing flexibility rules ensure that terms and conditions in special access tariffs and contracts are just and reasonable?

Parties should focus their comments on the analytical framework, including applicable law, they believe the Commission should use to arrive at fact-based answers to each of the key questions above. Parties should address whether, in applying their proposed analytical framework, the Commission can answer the questions based upon data contained in the existing record. If so, what record data must the Commission examine to answer the question? If not, precisely what additional data should the Commission collect and from whom, and why? Parties should also identify and address administrative concerns and practical considerations, such as obstacles to obtaining or evaluating specified data, and the time frame they believe would be required to perform their proposed analysis. To facilitate the Commission's review, parties are encouraged to

organize their comments by the key question numbers used in the Public Notice. If a party believes additional questions must be resolved, it should set forth the questions, provide an analytical framework to answer such questions, and describe the data necessary to answer the questions.

For purposes of illustration, the Public Notice included examples, which are based on the record in the special access proceeding, of proposed analytical frameworks. These examples are not intended to limit the types of analytical framework or data collection parties suggest in responding to the Public Notice, but rather to highlight some of the general arguments of which the Commission is aware.

### Paperwork Reduction Act Analysis

This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4). This document invites interested parties to comment on the appropriate analytical framework for examining the various issues that have been raised in the rulemaking proceeding on special access services pending before the Commission.

### Procedural Matters

#### *Ex Parte Requirements*

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. 47 CFR 1.1200 *et seq.* Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. 47 CFR 1.1206(b)(2). Other rules pertaining to oral and written presentations are set forth at 47 CFR 1.1206(b).

#### *Comment Filing Procedures*

Pursuant to Commission rules governing notices of proposed rulemakings, interested parties may file comments on or before January 19, 2010 and reply comments on or before February 17, 2010. 47 CFR 1.415, 1.419. All pleadings must reference WC Docket

No. 05-25 and RM-10593. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS); (2) the Federal Government's eRulemaking Portal; or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121, May 1, 1998. Comments may be filed electronically using the Internet by accessing the ECFS at <http://fjallfoss.fcc.gov/ecfs2/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the websites for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appears in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message: "get form." A sample form and directions will be sent in reply.

Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although the Commission continues to experience delays in receiving U.S. Postal Service mail). Parties are strongly encouraged to file comments electronically using the Commission's ECFS. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission.

The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S.

Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington DC 20554.

Parties should also send a copy of their filings to Margaret Dailey, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-A232, 445 12th Street, SW., Washington, DC 20554, or by e-mail to [margaret.dailey@fcc.gov](mailto:margaret.dailey@fcc.gov). Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, (202) 488-5300 or (800) 378-3160, or via e-mail to [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

Documents in WC Docket No. 05-25 and RM-10593 are available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Washington, DC 20554. The documents may also be purchased from BCPI, Web site <http://www.bcpiweb.com>, telephone (202) 488-5300 or (800) 378-3160, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com). These documents may also be viewed on the Commission's Web site at <http://www.fcc.gov/>. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format) or to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

### List of Subjects

#### *47 CFR Part 0*

Organization and functions (Government agencies).

#### *47 CFR Part 1*

Administrative practice and procedure, Communications common carriers, Telecommunications.

#### *47 CFR Parts 61 and 69*

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

Federal Communications Commission.

**Kirk S. Burgee,**

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