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

JOINT COMMENTS

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TABLE OF CONTENTS

SUMMARY

Joint Commenters urge the FCC to scale back the vast scope of the mandatory data collection requirements which would impose an enormous, and unjustified, burden on small carriers that purchase small amounts of special access. Good public policy disfavors, and the Paperwork Reduction Act ("PRA") prohibits, data collection requirements that impose undue cost with no corresponding public benefit. In this case, the data collection requirements adopted in the *Mandatory Data Collection Order* impose an enormous burden and substantial cost on small carriers that are purchasers of special access that is utterly disproportionate to any possible public benefit.

Specifically, Joint Commenters propose that any carrier that purchases less than $5 million annually in special access facilities in price cap areas -- that is, less than 1/40th of 1% of the $20 billion special access market by revenue -- should be exempt from the mandatory data collection requirements. The Joint Commenters use of special access facilities, which is far less than $5 million annually, constitutes an almost infinitesimal level of spending on special access facilities. The burden of producing such data is wholly disproportionate to the public interest in obtaining such data. Further, the practical utility of such data is close to zero.

If the FCC does not exempt small carriers, then the FCC should reduce the data collection burden on such carriers by doing the following:

- *Eliminate the requirement to furnish data for calendar year 2010.* It is grossly unfair and unduly burdensome to now require – without any prior notice – each and every carrier to furnish data that is more than two years old. In many cases, Joint Commenters have not identified and tracked such data in their electronic databases.
- *Exempt self-provisioned special access facilities from the data collection requirement.* Small carriers, many of whom self-provision a significant number of their backhaul facilities, should be exempt from providing data regarding such facilities.

- *Exempt the provision of special access facilities among affiliated entities from the data collection requirement.* The Commission should implement a *de minimis* threshold for any mandatory reporting requirement for such facilities. If the purchaser and the provider are each below the $5 million threshold proposed in these Joint Comments, both entities should be exempt from reporting affiliate transactions.
- *Narrow the scope of quantitative data to be provided by purchasers of special access facilities.* The Commission should narrow the scope of data so that only the most relevant data must be provided. Many of the data requirements imposed on purchasers are duplicative of the data requirements imposed on providers. It should be sufficient for only the provider to furnish such information.
- *Eliminate the requirement for purchasers of special access to provide qualitative information regarding the purchase of special access facilities.* The questions set forth in the "Terms and Conditions Information" portion of Appendix A do not seek quantitative, verifiable data. Instead, these are broad, open-ended questions inquiring about the purchaser's subjective "experience" and asking purchasers to identify "particularly onerous constraints". Such information should be submitted voluntarily.

Finally, the Commission should clarify precisely which carriers must provide data, and which carriers are required only to provide a completed form and a certification.

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Smith Bagley, Inc., Cellular Network Partnership, an Oklahoma Limited Partnership d/b/a Pioneer Cellular, Cross Telephone, L.L.C., Cellular Properties, Inc. d/b/a Cellular One of East Central Illinois and Nex-Tech Wireless, LLC (collectively, "Joint Commenters"), by counsel, hereby submit their Joint Comments in response to the Commission's mandatory data collection requirements adopted in the *Report and Order and Further Notice of Proposed Rulemaking* in the above-captioned proceeding.[1] Each of the Joint Commenters is a mobile wireless carrier, a purchaser of special access facilities, and a small business entity providing service predominantly in rural and/or tribal areas of the United States.

I. The FCC Should Re-Examine and Reduce the Vast Scope of the Mandatory Data Collection Requirements

The *Mandatory Data Collection Order* would impose an enormous, and unjustified, burden on small carriers that purchase small amounts of special access. As set forth below, Joint

[1] In the Matter of Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25, *Report and Order and Further Notice of Proposed Rulemaking*, released December 18, 2012, FCC 12-153 ("*Mandatory Data Collection Order*"). Joint Commenters do not address in this pleading the underlying issue of the state of competition in the market for special access facilities.

Commenters urge the FCC to scale back these mandatory data collection requirements by exempting certain small purchasers, as defined below, of special access facilities from the requirement to submit *any* data. If the FCC does not exempt such carriers, then the FCC should substantially reduce the data collection burden on such carriers by doing the following:

- Eliminating the requirement to furnish data for calendar year 2010;
- Exempting self-provisioned special access facilities from the data collection requirements;
- Exempting the provision of special access facilities among affiliated entities from the data collection requirements;
- Narrowing the scope of quantitative data to be provided by purchasers of special access facilities; and
- Eliminating the requirement for purchasers of special access to provide qualitative information regarding the purchase of special access facilities.

A. Background

In its *Mandatory Data Collection Order*, the FCC required *all* providers and *all* purchasers of special access services to submit data for calendar years 2010 and 2012. The FCC did not exempt any carrier, regardless of how small that carrier might be or how few special access services that carrier purchased. In its Final Regulatory Flexibility Act ("FRFA") analysis, the FCC:

> "note[d] concerns regarding the burden that this data collection will impose on small companies, and is mindful of the importance of seeking to reduce information collection burdens for small business concerns …."[2]

Unfortunately, the FCC gave little weight to these concerns, concluding that:

> "[c]ompetition in the provision of special access … appears to occur at a very granular level – perhaps as low as the building/tower. Accordingly, the Commission finds it necessary to obtain data from special access providers and purchasers of all sizes."[3]

[2] *Mandatory Data Collection Order*, Appendix B, Final Regulatory Flexibility Analysis ("FRFA") at ¶ 73, citing the Small Business Paperwork Relief Act of 2002, § 2(c)(3), Pub. L. No. 107-198, see 44 U.S.C. § 3506(c)(4).
[3] FRFA at ¶ 73.

The scope of quantitative data to be provided by mobile wireless carriers that are purchasers of special access facilities is onerous. Such carriers must provide, among other things, extensive data for each and every cell site on its network, including a complex categorization and detailed quantification of the special access facilities serving each site, including facilities that are self-provisioned and/or provided by affiliated entities.[4] All purchasers of special access must provide even more detailed information, including the dollar value of special access purchases broken down into numerous categories depending on the nature of the facilities and the provider of the facilities, and whether the facilities were purchased under tariff or by contract.[5] Even worse, purchasers must provide all of this information not only for 2012, but also for 2010.

In addition to vast amounts of quantitative data, the FCC also requires purchasers of special access facilities to provide a huge amount of qualitative data, including, but not limited to, the following:[6]

- An explanation of whether the terms and conditions of a contract for special access facilities constrain the purchaser's flexibility to make changes or purchase other services;
- A requirement to highlight contracts with particularly onerous constraints;
- An explanation of the purchaser's experience with changing transport providers and whether and how this has impacted the purchaser's ability to purchase dedicated services;
- A description of any circumstance since January 1, 2010 in which the purchaser has purchased circuits pursuant to a tariff solely for the purpose of meeting a volume commitment required for a discount;
- A summary for each year for the past five years of the number of times and in what geographic areas the purchaser has switched from one special access provider to another;
- A list of all available tariffs under which the purchaser has purchased special access together with a complex breakdown of each such purchase; and

[4] *Id.* at Appendix A, page 61.
[5] *Id.* at Appendix A, pages 61 – 62.
[6] *Id.* at Appendix A, pages 63 – 67.

- A description of various non-tariffed agreements with ILECs for the purchase of special access.

B. The FCC's Mandatory Data Collection Requirements Contravene Good Public Policy and Violate the Paperwork Reduction Act

Good public policy, not to mention the overarching objectives of the Paperwork Reduction Act ("PRA") disfavors -- and in the case of the PRA, prohibits -- data collection requirements that impose undue cost with no corresponding public benefit. In this case, the data collection requirements adopted in the *Mandatory Data Collection Order* impose an enormous burden and substantial cost on small carriers that are purchasers of special access that is utterly disproportionate to any possible public benefit.

A central purpose of the PRA is to "minimize the paperwork burden for individuals, small businesses … and other persons resulting from the collection of information by or for the Federal Government."[7] Under the PRA, an agency must estimate the burden of proposed information collections and justify the need for the collection. Significantly, an agency must:[8]

(3) Certify … that each collection of information …

(A) is necessary for the proper performance of the functions of the agency, including that the information has *practical utility*;

(B) is not unnecessarily duplicative of information otherwise reasonably accessible to the agency; [and]

(C) reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency, including with respect to small entities … the use of such techniques as –

(i) *establishing different … reporting requirements … that take into account the resources available to those who are to respond; … [and]*

(iii) *an exemption from coverage of the collection of information, or any part thereof ….*

[7] 44 U.S.C. § 3501(1).
[8] 44 U.S.C. § 3506 (emphasis added).

OMB's regulations further explain that "*[p]ractical utility means the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account … the agency's ability to process the information it collects … in a useful and timely fashion.*"[9]

Joint Commenters respectfully submit that the collection of data for special access facilities by each and every mobile service provider to each and every cell site in the United States lacks *practical utility* because the FCC, despite its very best intentions, cannot possibly process that information "in a useful and timely fashion." The volume of quantitative and qualitative information that the FCC would receive would be massive. In any event, the FCC does not even attempt to make a showing of the "practical utility" of collecting such data.

The FCC estimates that the average burden for each respondent will be 134 hours.[10] The average respondent would, therefore, require nearly four weeks of dedicated work by one employee to comply with the data collection requirements. The Joint Commenters have very small accounting and finance staffs – and therefore they would have to hire outside help, at a high cost, to work with their staff to prepare the requisite reports. The monetary and resource burden on small carriers would be enormous.

C. The FCC Should Implement a *De Minimis* Exemption for Small Purchasers

Joint Commenters urge the FCC to implement a *de minimis* exemption so that small carriers that purchase special access are not unduly burdened by the data collection requirements. The FCC has, in fact, provided an exemption -- based on a threshold level of customers -- to the requirement to submit data regarding best efforts business broadband Internet access services.[11]

[9] 5 C.F.R. § 1320.3(l) (emphasis added).
[10] 78 FR 9911 (February 12, 2013).
[11] *Mandatory Data Collection Order* at ¶ 22.

The FCC has not, however, provided any exemption to the requirement for the submission of data regarding the purchase of special access facilities.[12]

Mobile wireless carriers alone spend billions of dollars purchasing special access facilities to serve hundreds of thousands of cell sites, in addition to the purchase of special access facilities for other purposes (such as transporting voice and data traffic between mobile switching centers and the points of presence of interexchange carriers). The mobile wireless backhaul market alone has been estimated to be $3 billion annually by the first half of 2011, increasing to $8 - $10 billion in the near future due to rapid increases in wireless data traffic.[13] An October 2008 report found 230,000 cell sites in the United States, with 530,000 backhaul lines from those sites.[14] T-Mobile alone reports over 32,000 cell sites.[15]

Further, the size of the market for the provision of special access facilities to mobile wireless carriers is only a fraction of the overall special access market, which includes the provision of facilities to cable MSOs, interexchange carriers, and Internet service providers. According to the most recent FCC data available, the special access revenue of ILECs alone had already reached $16 billion in 2007.[16] With the meteoric growth of data traffic in the past five years, the current revenue level is almost certainly much higher.

The Joint Commenters use of special access facilities constitutes an almost infinitesimal level of spending on special access facilities. The highest level of spending on *all* special access facilities (backhaul from cell sites plus other special access facilities) by any of the Joint

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[12] *Id.*

[13] *Sixteenth Report, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services,* WT Docket No. 11-186, FCC 13-34, released March 21, 2013 ("*16th Annual CMRS Report")* at ¶ 330, citing *Storming the Cell Tower: MSOs Move Wireless Backhaul to the Forefront*, Heavy Reading, at 3 (July 2011). This estimate only includes backhaul from cell towers.

[14] *16th Annual CMRS Report* at ¶ 331 n. 993, citing *Wireless Backhaul Market Study*, New Paradigm Resources, Oct. 2008.

[15] *16th Annual CMRS Report* at ¶ 333.

[16] Federal Communications Commission, Statistics of Common Carriers, Table 2.11 (2006/2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-301505A1.pdf.

Commenters is far less than $5 million. If we conservatively assume that spending on wireless backhaul alone (thus, not even counting other special access facilities used by wireless carriers) is now $5 billion, the Joint Commenters each account for far less than 1/10th of 1% of just the wireless cell site backhaul market measured by revenue, and far less than 1/40th of 1% of the ILEC market for special access facilities.[17]

Joint Commenters propose that any carrier that purchases less than $5 million annually in special access facilities in price cap areas -- that is, less than 1/40th of 1% of a $20 billion special access market by revenue -- should be exempt from the mandatory data collection requirements. The burden of producing such data is wholly disproportionate to the public interest in obtaining such data. Further, as discussed above, the practical utility of such data is close to zero.

D. If the FCC Does Not Exempt Small Carriers, Then the FCC Should Substantially Reduce the Data Collection Burden on Such Carriers

If the FCC does not exempt small carriers, then the FCC should reduce the data collection burden by doing the following: (1) eliminating the requirement to furnish data for calendar year 2010; (2) exempting self-provisioned special access facilities from the data collection requirements; (3) exempting the provision of special access facilities among affiliated entities from the data collection requirements; (4) narrowing the scope of quantitative data to be provided by purchasers of special access facilities; and (5) eliminating the requirement for purchasers of special access to provide qualitative information regarding the purchase of special access facilities. Such reductions in the data collection requirements are required by the PRA, which requires an agency to "reduce to the extent practicable and appropriate the burden on

[17] Joint Commenters are comparing their total spending on <u>all</u> special access facilities (of which backhaul from cell sites is a part) with the estimates of spending on special access only for backhaul from cell sites. Joint Commenters are using a very conservative estimate of $20 billion for current ILEC revenue from special access facilities. Joint Commenters recognize that some of the estimated ILEC revenue is derived from rate-of-return areas, which are not part of the market being examined by the Commission.

person who shall provide information to … the agency, including with respect to small entities … the use of such techniques as – establishing different … reporting requirements … that take into account the resources available to those who are to respond ….”[18]

1. The FCC Should Eliminate the Requirement to Furnish Data for Calendar Year 2010

The requirement to provide data for calendar year 2010 is particularly burdensome. Without any prior notice, carriers are now mandated to produce data that is more than two years old. In many cases, Joint Commenters have not identified and tracked such data in their electronic databases. Furthermore, in the case of the qualitative information requests, the information cannot be tracked in, let alone extracted from, any database. Thus, carriers would now have to retroactively try to identify and capture the quantitative data, and try to recall the qualitative data. This will make the task all the more daunting – and expensive.

Joint Commenters urge the FCC to eliminate any requirement to provide data prior to calendar year 2012. It is grossly unfair and unduly burdensome to now require – without any prior notice – each and every carrier to furnish data that is more than two years old.

2. Small Carriers Should be Exempt from Providing Data Regarding Self-Provisioned Special Access Facilities

The Joint Commenters self-provision many of their backhaul facilities, particularly from their cell sites. One of the Joint Commenters self-provisions over 90% of its backhaul facilities to its cell towers. Small carriers, many of whom self-provision a significant number of their backhaul facilities, should be exempt from providing data regarding such facilities. These facilities are not part of the “market” for special access facilities. There is no market price for

[18] 44 U.S.C. § 3506 (3)(C)(i).

the use of such facilities. Joint Commenters do not object, however, to a limited data collection requirement to simply report the aggregate number of self-provisioned facilities.

In all events, Joint Commenters urge the FCC to confirm that -- at most -- self-provisioned facilities must only be reported under Section II.E.2.j of Appendix A, which applies to purchasers of special access facilities. It would be unduly burdensome and wholly unnecessary to require such entities to comply with the massive data collection requirements imposed upon providers of special access facilities. In the case of self-provisioning, the purchaser and the provider are the same entity, and the "provider" has no customers except itself for such self-provisioned facilities.

3. Small Carriers Should be Exempt From Providing Data Regarding Special Access Facilities Provided to and Purchased from Affiliates

Several of the Joint Commenters purchase some of their special access facilities from affiliated entities. The combined burden on the affiliated purchaser and provider would be onerous. Joint Commenters urge the Commission to implement a *de minimis* threshold for any mandatory reporting requirement for such facilities. If the purchaser and the provider are each below the $5 million threshold proposed in Section I.C above, both entities should be exempt from reporting affiliate transactions. Joint Commenters do not object, however, to a limited data collection requirement on the provider to simply report the aggregate number of special access facilities it provides to each of its affiliated entities.

4. The FCC Should Narrow the Scope of Quantitative Data to be Provided by Small Carriers

The scope of quantitative data to be provided by small carriers is unduly burdensome and, in many aspects, unnecessarily repetitive of the data to be furnished by the providers of such

facilities. The Joint Commenters urge the FCC to narrow the scope of data so that only the most relevant data must be provided.

The *Mandatory Data Collection Order* requires mobile wireless service providers to furnish extensive data for each cell site on a carrier's network as of December 31, 2010 and December 31, 2012.[19] The Joint Commenters submit that the requirement for purchasers to submit this data is often unnecessary and duplicative. It should be sufficient for a purchaser of special access facilities to simply identify each of its cell sites where it purchases special access from a third-party provider, to provide the address and geographic coordinates for the site, the number of dedicated access facilities serving the site, and the name of the service provider(s). The Joint Commenters submit that the Commission can then match that information to the more detailed information required to be furnished by the service provider(s) by Sections II.A.4 and II.B.3 of Appendix A. Accordingly, the Commission should not require purchasers to provide the following data:

- the CLLI code of the ILEC wire center that serves the site, where applicable
- whether the cell site is in or on a building, etc.
- if the cell site is served by a CBDS, PBDS, or a wireless connection, and the equivalent number of DS1s used (for CBDS) or the bandwidth of the circuit in Mbps (for PBDS and wireless connections)

The *Mandatory Data Collection Order* requires all purchasers of special access facilities to provide even more detailed information, including the dollar value of special access purchases broken down into numerous categories depending on the nature of the facilities and the provider of the facilities, and whether the facilities were purchased under tariff or by contract.[20] To the extent this data must be furnished, it should be furnished by the service provider. The service provider has all of this data. It is duplicative, and therefore wholly unnecessary, to require both

[19] *Mandatory Data Collection Order* at Appendix A, Section II.E.2.
[20] *Id.* at pages 61 – 62.

the provider and the purchaser to furnish such data. At most, small carriers should be required only to furnish the aggregate data set forth in the first sentence of Sections II.F.2, 3, 4 and 5, but not the complex data set forth in Subsections II.F.3 a – h, 4.a – d, 5.a – d, 6.a, and 7.a. The burden on small carriers to provide such data would be enormous and wholly disproportionate to the value of the data. The Joint Commenters submit that the FCC cannot meaningfully analyze such data, and thus, there is little or no practical utility to furnishing such data.

5. The Commission Should Eliminate the Requirement for All Purchasers of Special Access to Provide Qualitative Information Regarding their Purchase of Special Access Facilities

In addition to vast amounts of quantitative data, the *Mandatory Data Collection Order* also requires purchasers of special access facilities to provide a very substantial amount of qualitative data, including, but not limited to, the following:[21]

- An explanation of whether the terms and conditions of a contract for special access facilities constrain the purchaser's flexibility to make changes or purchase other services;
- A requirement to highlight contracts with particularly onerous constraints;
- An explanation of the purchaser's experience with changing Transport Providers and whether and how this has impacted the purchaser's ability to purchase Dedicated Services;
- A description of any circumstance since January 1, 2010 in which the purchaser has purchased circuits pursuant to a tariff solely for the purpose of meeting a volume commitment required for a discount;
- A summary for each year for the past five years of the number of times and in what geographic areas the purchaser has switched from one special access provider to another;
- A list of all available tariffs under which the purchaser has purchased special access together with a complex breakdown of each such purchase; and
- A description of various non-tariffed agreements with ILECs for the purchase of special access.

[21] *Id.* at pages 63 – 67.

Joint Commenters vigorously object to the mandatory requirement to prepare and file this qualitative information. Many of these questions do not seek quantitative, verifiable data. Instead, these are broad, open-ended questions inquiring about the purchaser's subjective "experience" and asking purchasers to identify "particularly onerous constraints". The Joint Commenters submit that this is not a request for data, but instead an unprecedented mandate for each and every carrier, regardless of their size and utilization of special access facilities, to prepare and file comments in a NPRM-like proceeding. Such information should be submitted voluntarily.

Joint Commenters further note that compiling such information will be particularly burdensome. Such information cannot be extracted from a database. Instead, senior management will have to devote numerous hours of their valuable time to preparing text responses to each of the qualitative questions. Again, the burden of producing such data is wholly disproportionate to the value of such data.

II. The Commission Should Clarify Which Carriers Must Provide Data and Which Carriers Must Provide Only a Completed Form and a Certification

The text of the *Mandatory Data Collection Order* does not state that certain carriers that are not required to provide data must still file a completed form and a certification. Paragraphs 21 and 23 of the *Mandatory Data Collection Order* and paragraph 71 of the Final Regulatory Flexibility Act Analysis (FRFA) simply state that providers and purchasers in geographic areas in which a rate of return carrier is the incumbent will not be considered a provider or a purchaser, and will not be required to provide data for such areas. Joint Commenters also note that the text of the *Mandatory Data Collection Order* does not state that non-ILEC providers in rate-of-return areas are exempt from the data collection requirements; only paragraph 71 of the FRFA states this. Joint Commenters recommend that the Commission clarify this exemption.

Section G of Appendix A provides that:

> "Non-*Providers* and Non-*Purchasers* instructed to respond to this data collection must respond to the following:

1. If you must respond to this data collection because you filed the FCC Form 477 in 2012 … but are not a *Provider* or a *Purchaser* … then indicate as such below and complete the certification accompanying this data collection."[22]

However, neither the text of the Order, or Appendix A, states that the universe of entities that must file Appendix A consists of carriers that file Form 477.[23] Suppose that a carrier must file Form 477, but operates in a geographic area served by an ILEC that is a rate-of-return carrier. That carrier could be a provider and/or a purchaser of special access services. The Commission needs to clarify whether such carriers must complete Section G ("non-providers and non-purchasers instructed to respond to this data collection must respond")? As explained below, the Order is not at all clear on this matter. Joint Commenters recommend that the Bureau clarify (if, in fact, this was the intention of the Commission) that any carrier that files a Form 477 in 2012 to report the provision of "broadband connections to end user locations" – even if the carrier provides only one such connection – will be required to file Section G and the Certification. The Bureau should further clarify that the *data collection requirements* do not apply to providers and purchasers in areas served by rate of return ILECs, but such providers must still *file* portions of the form.

III. Conclusion

For the reasons set forth herein, Joint Commenters urge the FCC to scale back the vast scope of the mandatory data collection requirements which would impose an enormous, and unjustified, burden on small carriers that purchase small amounts of special access. Specifically,

[22] Emphasis in original.

[23] Joint Commenters also note that Section G should be revised to read as follows: "… but are not (a) a Provider or a Purchaser as defined in this data collection or (b) an entity that provides Best Efforts Business Broadband Internet Access service *as defined in this data collection*, then indicate …." Adding the italicized language is necessary to make clear that entities (1) in rate of return areas or (2) with fewer than 15,000 customers and 1,500 business broadband customers are not required to file data regarding their best efforts business broadband Internet access services.

Joint Commenters propose that any carrier that purchases less than $5 million annually in special access facilities in price cap areas should be exempt from the mandatory data collection requirements. If the FCC does not exempt small carriers, then the FCC should reduce the data collection burden on such carriers by doing the following: (1) eliminating the requirement to furnish data for calendar year 2010; (2) exempting self-provisioned special access facilities from the data collection requirements; (3) exempting the provision of special access facilities among affiliated entities from the data collection requirements; (4) narrowing the scope of quantitative data to be provided by purchasers of special access facilities; and (5) eliminating the requirement for purchasers of special access to provide qualitative information regarding the purchase of special access facilities.

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