

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

In the Matter of
SBC Communications Inc.
Petition for Waiver of Section 61.42
of the Commission's Rules
WC Docket No. 03-250

ORDER

Adopted: April 20, 2007

Released: April 20, 2007

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we grant a request from AT&T for a waiver of certain requirements under the Commission's price cap rules and regulations to allow AT&T to exercise pricing flexibility for advanced services that rely on packet technology similar to the pricing flexibility it has for other special access services.

1 SBC Communications Inc. Petition for Waiver of Section 61.42 of the Commission's Rules, WC Docket No. 03-250, at 2 (filed Dec. 9, 2003) (AT&T Petition). The relief was sought on behalf of, and in this order is granted to, Pacific Bell Telephone Company, Southwestern Bell Telephone Company, the Ameritech Operating Companies, the Southern New England Telephone Company, and Nevada Bell Telephone Company.

2 Verizon Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services, WC Docket No. 04-246, Memorandum Opinion and Order, 20 FCC Rcd 16840, para. 1 (2005) (Verizon Advanced Services Waiver Order). According to AT&T, these services are provided using packet switching equipment and facilities that reach the end user through special access line connections.

II. BACKGROUND

2. Following passage of the Telecommunications Act of 1996,³ the Commission adopted the *Pricing Flexibility Order*, which established a framework for granting price cap local exchange carriers (LECs) flexibility in the pricing of certain interstate access services as competition for those services develops.⁴ Pursuant to rules established in the *Pricing Flexibility Order*, carriers may qualify for pricing flexibility for specific services in two phases by satisfying certain competitive showings designed to demonstrate that market conditions in a particular Metropolitan Statistical Area (MSA) warrant the relief they seek.⁵ Phase II regulatory relief provides greater pricing flexibility and thus requires a higher competitive showing.⁶ In order for certain access services to be eligible for pricing flexibility, however, they must be subject to price cap regulation.⁷ But, as AT&T explains, packet-switched services in the areas then served by SBC were never incorporated into price caps because the 1990 *LEC Price Cap Order* was interpreted to exclude these services from price cap regulation.⁸ Consequently, these services never qualified for pricing flexibility.

3. In 2002, the Commission relaxed pricing restrictions for AT&T by forbearing from tariff regulation of its advanced services in areas then served by SBC on the condition that it provide these services through a separate affiliate.⁹ This allowed AT&T to exercise pricing flexibility for these services

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* We refer to these collectively as the “Communications Act” or the “Act.”

⁴ *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14225, para. 3 (1999) (*Pricing Flexibility Order*), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

⁵ *See generally* 47 C.F.R. § 1.774; 47 C.F.R. Part 69, Subpart H (Pricing Flexibility Rules). To obtain Phase I relief for interstate special access and dedicated transport services other than channel terminations between a LEC end office and an end user’s customer premises, a price cap LEC must demonstrate that unaffiliated competitors have collocated in at least 15 percent of the LEC’s wire centers within an MSA or collocated in wire centers accounting for 30 percent of the LEC’s revenues from these services within the MSA and that at least one of these collocators in each wire center is using competitive transport facilities. 47 C.F.R. § 69.709(b); *see Pricing Flexibility Order*, 14 FCC Rcd at 14234-35, para. 24. Higher thresholds apply for obtaining relief for channel terminations between a LEC’s end office and an end-user customer. 47 C.F.R. §§ 69.711(b), (c).

⁶ *Pricing Flexibility Order*, 14 FCC Rcd at 14296, para. 141. To obtain Phase II relief for special access and dedicated transport services other than channel terminations between a LEC end office and an end-user customer, the trigger thresholds are unaffiliated collocation in 50 percent of the LEC’s wire centers or in wire centers accounting for 65 percent of the LEC’s revenues from these services within the MSA and at least one collocator in each wire center is using competitive transport. 47 C.F.R. § 69.709(c); *see Pricing Flexibility Order*, 14 FCC Rcd at 14235, para. 25.

⁷ *See id.* at 14224 n.1; 47 C.F.R. §§ 69.709(a), 69.711(a), 69.713(a) (listing services for which LECs may seek pricing flexibility). Not all services offered by price cap LECs are in price caps. Upon the adoption of price cap regulation in 1990, the Commission excluded some services from this system of regulation. *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6810, paras. 191-97 (1990) (*LEC Price Cap Order*), Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), *modified on recon.*, 6 FCC Rcd 2637 (1991), *aff'd sub nom. National Rural Telecom Ass’n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

⁸ AT&T Petition at 2 (citing *LEC Price Cap Order*, 5 FCC Rcd at 6810, paras. 191, 195); *see also* AT&T Nov. 15 *Ex Parte* Letter at 3. AT&T further explains that some high-speed services, such as GigaMAN, are advanced services but not packet-switched services and thus were placed into price caps (special access basket). AT&T Petition at 8-9.

⁹ *See generally Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000 (2002) (*SBC Advanced Services Forbearance Order*).

by offering them through its affiliate, Advanced Solutions, Inc. (ASI), rather than through its LECs.¹⁰ AT&T, however, also offers some advanced services through its LECs that do not qualify for the 2002 forbearance relief.¹¹ Accordingly, with this petition, AT&T seeks authority to place into price caps those packet-switched services that its LECs offered outside of price cap regulation, so that these services could subsequently qualify for pricing flexibility.¹² Specifically, AT&T requests the ability to exercise pricing flexibility for its Optical Ethernet Metropolitan Area Network (OPT-E-MAN) service, which it offers through its LECs, and for new packet-based advanced services that it may offer through the AT&T LECs in the future.¹³

4. A few months after AT&T filed its petition, Verizon also filed a waiver petition seeking pricing flexibility for certain packet-based services.¹⁴ On September 22, 2005, the Commission granted Verizon's waiver request so that it could exercise pricing flexibility for packet-based services similar to the pricing flexibility that it has for other special access services.¹⁵ The Commission noted in that order that it intended to address AT&T's pending petition separately.¹⁶ AT&T has clarified that it seeks a waiver of the same rules and requests the same pricing flexibility relief that Verizon received.¹⁷ Specifically, AT&T seeks a waiver to permit it to exercise Phase I pricing flexibility for advanced services offered through its LECs in MSAs where it already has qualified for Phase I or II pricing flexibility for other special access services.¹⁸ Relying on the *Verizon Advanced Services Waiver Order*, AT&T argues that its advanced services are entitled to pricing flexibility in various areas without an additional competitive showing because: (1) these services are special access services;¹⁹ and (2) the Commission has already determined that sufficient competition exists in those areas to warrant pricing flexibility relief for special access services.²⁰ AT&T further requests a waiver to enable it to qualify for

¹⁰ *Id.*

¹¹ AT&T Petition at 1; AT&T Nov. 15 *Ex Parte* Letter at 1, 3.

¹² *Id.* at 1, 5. AT&T also refers to packet-switched services as advanced services. *See, e.g.*, AT&T Petition at 6.

¹³ AT&T Petition at 1; AT&T Nov. 15 *Ex Parte* Letter at 1 n.2, 5 (explaining that OPT-E-MAN is the only packet-switched advanced service currently offered by the AT&T incumbent LECs that is subject to the waiver relief requested here). The other packet-switched service that is offered through the AT&T LECs, Broadband Passive Optical Network, is excluded from the waiver request. AT&T Petition at 1; AT&T Nov. 15 *Ex Parte* Letter at 1 n.2.

¹⁴ Verizon Petition for Waiver to Allow It to Exercise Pricing Flexibility for Advanced Services Where the Commission Has Granted Relief for Traditional Special Access Services, WC Docket No. 04-246 (filed June 25, 2004). Even though both AT&T and Verizon requested similar relief, they sought it through waiver of different rules.

¹⁵ *See generally Verizon Advanced Services Waiver Order*, 20 FCC Rcd 16840.

¹⁶ *Id.* at 16843, para. 7 n.24.

¹⁷ AT&T Nov. 15 *Ex Parte* Letter at 3 (citing *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16840, 16844, paras. 1, 8). AT&T clarified that it modified its waiver request in order to seek the same relief that Verizon received and thus no longer sought a waiver of section 61.42 of the Commission's rules. *See id.*; 47 C.F.R. § 61.42.

¹⁸ AT&T Nov. 15 *Ex Parte* Letter at 5.

¹⁹ Letter from Sarah L. Green, Associate Director-Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-250, at 1 (filed Dec. 14, 2005) (AT&T Dec. 14 *Ex Parte* Letter) ("OPT-E-MAN is a special access product similar to AT&T's other special access services with variable speeds and destination options.").

²⁰ AT&T Nov. 15 *Ex Parte* Letter at 3-5 (applying arguments and analysis contained in the *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16848-50, paras. 15-18).

Phase II pricing flexibility for such advanced services in these areas by satisfying the competitive triggers set forth in the Commission's pricing flexibility rules.²¹

III. DISCUSSION

5. In this order, we grant AT&T the same relief that Verizon received in the *Verizon Advanced Services Waiver Order*.²² We recognize that the Commission will determine the overall regulatory treatment of advanced services on a going forward basis when it completes the *Dom/Non-Dom* and *Special Access NPRM* proceedings.²³ As the Commission previously noted, the grant of the waiver to allow Verizon limited pricing flexibility relief for advanced services was interim in nature and did not prejudge broader issues related to the regulatory treatment of advanced services.²⁴ Similarly, our decision here does not prejudge the full and fair consideration of these issues in the ongoing proceedings.

6. The Commission may waive its regulations for good cause shown.²⁵ In general, the waiver request must demonstrate special circumstances warranting a deviation from the general rule, and that such a deviation will serve the public interest.²⁶ For the reasons discussed below and consistent with the Commission's findings in the *Verizon Advanced Services Waiver Order*, we conclude that good cause exists to permit AT&T to exercise pricing flexibility for advanced services that rely on packet technology, specifically OPT-E-MAN service, similar to the pricing flexibility relief that it has for other special access services.²⁷ We thus grant a waiver enabling AT&T to exercise Phase I pricing flexibility for packet-based services in those MSAs where it already has qualified for Phase I or II pricing flexibility for its special access services. That is, we waive sections 1.774, 69.709, 69.711, and 69.727 of the Commission's pricing flexibility rules for these packet-based services.²⁸ Where AT&T has not yet qualified for pricing flexibility, it may include such advanced services in any future pricing flexibility petitions, but it must support such petitions with data regarding its advanced services and must satisfy the competitive showings set forth in the Commission's rules.²⁹

²¹ AT&T Nov. 15 *Ex Parte* Letter at 5.

²² See generally *Verizon Advanced Services Waiver Order*, 20 FCC Rcd 16840. We emphasize that the waiver granted herein in no way affects AT&T's obligations under the special access conditions adopted in the *AT&T-BellSouth Merger Order*. See *infra* para. 11. As such, AT&T's ability to implement the full scope of the relief granted in this order may be delayed.

²³ See generally *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Dom/Non-Dom NPRM*); *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*Special Access NPRM*).

²⁴ *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16848, para. 14.

²⁵ 47 C.F.R. § 1.3.

²⁶ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

²⁷ *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16844, para. 8.

²⁸ Specifically, we waive the requirement that services must be in price caps to be eligible for pricing flexibility for Phase I and II relief and the following rules as applicable to Phase I relief: 47 C.F.R. §§ 1.774 (requiring petitions for pricing flexibility to include collocation and wire center data by MSA and to "show that the price cap LEC has met the relevant thresholds"), 69.709(b) (establishing Phase I triggers for special access services other than channel terminations between LEC end offices and the customer premises), 69.711(b) (establishing Phase I triggers for end-user channel terminations), and 69.727(a) (requiring price cap LECs to satisfy Phase I triggers, but the waiver does not apply to the rule's other provisions).

²⁹ See, e.g., 47 C.F.R. § 1.774; 47 C.F.R. Part 69, Subpart H.

7. We find that AT&T demonstrates special circumstances that warrant a waiver in this case. Specifically, the carrier excluded packet-switched advanced services from price caps to comply with Commission rules.³⁰ As a result, AT&T was unable to take advantage of pricing flexibility for these services when it became an option several years later. The Commission recognized in the *Verizon Advanced Services Waiver Order* that carriers that compete against Verizon are able to offer the types of services at issue here, and some pricing flexibility was warranted.³¹ Consistent with that finding, the Commission previously granted AT&T substantial regulatory relief for advanced services that are offered through ASI.³² In some cases, however, it may not be economically rational to offer advanced services through an affiliate such as ASI.³³ Under the Commission's rules, this waiver provides AT&T with a mechanism to seek regulatory relief in these circumstances.

8. We also find that the waiver granted here serves the public interest. Providing AT&T the flexibility to offer contract tariffs tailored to the needs of individual customers will enable it to respond more effectively to competition. Thus, the waiver will promote competition in the market for advanced services and result in more choices and better prices for customers. Moreover, we conclude that the administrative and regulatory burdens associated with requiring AT&T to satisfy an additional competitive showing for Phase I relief outweigh the benefits of such a showing. AT&T specifically seeks pricing flexibility for an advanced service known as OPT-E-MAN, which uses Ethernet technology and is purchased by customers that require high-speed, packet-switched transmission.³⁴ OPT-E-MAN is a special access service, and AT&T has already satisfied the competitive triggers to demonstrate a sufficient competitive presence in certain areas to warrant pricing flexibility for special access services.³⁵

³⁰ AT&T Petition at 2; AT&T Nov. 15 *Ex Parte* Letter at 3. As an initial matter, we find it unnecessary for AT&T's LECs in areas formerly served by SBC to incorporate these services into price caps before they are eligible for pricing flexibility. As described in para. 2, *supra*, the advanced services at issue were not included in price caps because of questions regarding the appropriate regulatory treatment of advanced services. This is currently an open question before the Commission in pending rulemaking proceedings, such as those initiated by the *Dom/Non-Dom NPRM* and the *Special Access NPRM*. See generally *Dom/Non-Dom NPRM*, 16 FCC Rcd 22745; *Special Access NPRM*, 20 FCC Rcd 1994. Consistent with the Commission's *Verizon Advanced Services Waiver Order*, we find that these procedural circumstances should not act to preclude AT&T from obtaining pricing flexibility for these services. *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16844, para. 8 n.31.

³¹ See, e.g., *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16846, para. 11.

³² See generally *SBC Advanced Services Forbearance Order*, 17 FCC Rcd 27000.

³³ See AT&T Nov. 15 *Ex Parte* Letter at 3 (contending this is the case, for example, when ASI does not own its transmission facilities).

³⁴ AT&T Nov. 15 *Ex Parte* Letter at 1. See also AT&T Dec. 14 *Ex Parte* Letter at 1. AT&T states that retail end users, specifically large and medium business customers, such as those providing financial/banking, medical, and educational services, are the primary purchasers of OPT-E-MAN. *Id.* OPT-E-MAN service uses packet switching equipment and facilities, such as an Ethernet switch, and it includes facilities that provide functions similar to channel terminations and interoffice facilities. AT&T Dec. 14 *Ex Parte* Letter at 6; AT&T Dec. 22 *Ex Parte* Letter at 2, Ex. 1.

³⁵ OPT-E-MAN service "uses an optical Ethernet network that is entirely separate from the public switched telephone network." AT&T Reply at 10. We note that, while AT&T filed these reply comments after the due date, it provided timely notification to the Commission and other parties of the circumstances giving rise to the late filing, in accordance with the rules. Thus no party was prejudiced. We therefore accept the reply comments into the record. See *SBC Communications Inc. Petition for Waiver of Section 61.42 of the Commission's Rules*, WC Docket No. 03-250, Motion to Accept Late-Filed Comments (filed Feb. 5, 2004). OPT-E-MAN service enables an end-user customer to connect two or more of its locations or to connect to a carrier's point of presence. Letter from Sarah L. Green, Associate Director-Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-250, at 1-3 (filed Nov. 15, 2005) (AT&T Nov. 15 Data Response *Ex Parte* Letter). Because OPT-E-MAN service does not use local switches, it is a special access service. See (continued....)

In similar circumstances in the *Verizon Advanced Services Waiver Order*, the Commission concluded that requiring independent competitive showings for advanced services in those same areas would serve no additional purpose and is unnecessary for Phase I relief.³⁶ The Commission found that requiring a separate competitive showing would not be in the public interest because it would result in a duplication and waste of resources that would merely create undue administrative and regulatory burdens.³⁷ We find that the administrative burdens and delay of imposing such a showing here likewise would not serve the public interest.³⁸

9. We reject AT&T Corp.'s complaint that competition may be adversely affected if a waiver is granted because it must purchase from the AT&T's LECs the "last mile access services," such as special access channel terminations, to reach the end-user customer.³⁹ The pricing flexibility triggers serve as a proxy to demonstrate the availability of competitive alternatives for incumbent LEC special access services.⁴⁰ AT&T will receive the relief granted here only where it has obtained pricing flexibility for special access services (other than OPT-E-MAN) that other carriers might use to provide comparable

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Pricing Flexibility Order, 14 FCC Rcd at 14226, para. 8 (There are "two basic categories of access services: special access services and switched access services. Special access services do not use local switches.").

³⁶ *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16846, para. 11. For this reason, we also conclude that the waiver here does not undermine the rationale underlying the competitive showings required under the Commission's pricing flexibility rules. See *id.* at 16849, para. 16 (explaining sufficient competition exists to warrant pricing flexibility for advanced services in certain areas).

³⁷ *Id.* at 16846, para. 11 n.42 (explaining administrative burdens and delay that would be incurred by a carrier if a new competitive showing were required).

³⁸ Consistent with the *Verizon Advanced Services Waiver Order*, we note that AT&T must have qualified for Phase I or II relief for *both* end-user channel terminations and special access services other than end-user channel terminations in all MSAs in which the service is provisioned for each part of the service to qualify for pricing flexibility. *Id.* at 16846, para. 11 n.49. OPT-E-MAN service includes rate elements, such as the port and committed information rate, that provide functions similar to end-user channel terminations. AT&T Dec. 14 *Ex Parte* Letter at 3. Under the *Pricing Flexibility Order*, higher thresholds apply for obtaining Phase I or II relief for channel terminations between an end-user customer and a LEC's office serving that end user, than apply to other special access facilities, e.g., channel terminations to another carrier's point of presence (POP) or interoffice transport facilities. *Pricing Flexibility Order*, 14 FCC Rcd at 14278, 14299-300, paras. 100, 150.

³⁹ AT&T Corp. Opposition at 10-11. Prior to the merger, AT&T Corp. filed an opposition to the petition on Jan. 7, 2004 (AT&T Corp. Opposition). We will refer to the pre-merger AT&T corporate entity as "AT&T Corp." AT&T Corp. filed comments prior to its merger with SBC, arguing that a grant of a waiver could result in discriminatory, anticompetitive pricing and an increase in special access rates. AT&T Corp. Opposition at 3, 9-11. AT&T Corp. also disputed the competitive nature of the advanced services marketplace and asserted that the Bell companies' "control over bottleneck facilities" poses a risk to competition. AT&T Corp. Opposition at 6-11. The Commission rejected these arguments when it granted a waiver to allow Verizon to exercise pricing flexibility for certain packet-based advanced services. *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16846-48, paras. 12-14 (stating that the pending *Dom/Non-Dom NPRM* is better suited to conduct a complex analysis to determine the competitive nature of the packet-switching market and that the *Special Access NPRM* is the appropriate proceeding to address arguments concerning special access competition and rates, "price squeeze" issues, and whether action is needed to ensure just and reasonable rates). When the Commission initiated the *Special Access NPRM*, it found there was insufficient record data to impose a moratorium on the consideration of pricing flexibility applications. *Special Access NPRM*, 20 FCC Rcd at 1997, para. 6. AT&T also has since completed its merger with BellSouth Corporation (BellSouth). See *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, FCC 06-189 (rel. Mar. 26, 2007) (*AT&T-BellSouth Merger Order*); *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Order on Reconsideration, FCC 07-44 (rel. Mar. 26, 2007) (*AT&T-BellSouth Merger Reconsideration Order*).

⁴⁰ *Pricing Flexibility Order*, 14 FCC Rcd at 14261-62, para. 77-78; *WorldCom, Inc. v. FCC*, 238 F.3d at 452.

advanced services in competition with AT&T.⁴¹ For example, if AT&T's advanced service contains rate elements that provide a function similar to a channel termination, AT&T cannot exercise pricing flexibility for that service unless it has met the pricing flexibility triggers for channel terminations in the relevant MSAs. Thus, the carrier will have already received pricing flexibility for the last mile access services that AT&T Corp. contends may adversely affect competition. This proceeding does not give AT&T any additional authority to change prices for these services.

10. Consistent with the Commission's finding in the *Verizon Advanced Services Waiver Order*, we find that the waiver that we grant in this proceeding will not undermine the policies underlying the Commission's price cap and pricing flexibility rules.⁴² The price cap system, adopted in 1990, was designed to replicate some of the efficiency incentives present in competitive markets and to act as a transitional regulatory mechanism en route to full competition.⁴³ The Commission established the pricing flexibility framework to permit price cap LECs greater pricing flexibility as greater competition develops.⁴⁴ The policy underlying Phase I pricing flexibility is to allow incumbent LECs to respond to competition as it develops, while at the same time using the price cap mechanism to guard against unreasonable rate increases for those customers that do not yet have competitive alternatives.⁴⁵

11. Although Phase I relief for special access services is designed to provide incumbent LECs with greater flexibility in lowering prices for particular customers, the Commission's Phase I pricing flexibility rules require price cap LECs to continue to offer special access services at generally available tariffed rates that are subject to price caps.⁴⁶ These rates are constrained by price cap regulation to protect customers without competitive alternatives.⁴⁷ Accordingly, this safeguard works as intended if services are subject to price caps before becoming eligible for Phase I pricing flexibility. Although the tariffed rates for AT&T's advanced services are not subject to price cap regulation in areas formerly served by SBC, we find, as the Commission did in the *Verizon Advanced Services Waiver Order*, that there are other mechanisms in place to protect customers that lack competitive alternatives.⁴⁸ First, AT&T is presently committed for a 48-month period not to increase tariffed rates for special access services, including rates reflected in contract tariffs.⁴⁹ Following this period of time, AT&T's tariffed

⁴¹ The Commission has concluded that competitors would not be impaired in their ability to offer their own advanced services to customers if they lack access to incumbent LECs' packet switching. See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17321-23, paras. 537-39 (2003) ("[C]ompetitive carriers lead incumbent LECs in the deployment of Gigabit Ethernet switches."), Errata, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313 (2004).

⁴² *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16848-49, para. 15.

⁴³ *Pricing Flexibility Order*, 14 FCC Rcd at 14227, para. 11.

⁴⁴ *Id.* at 14225, para. 3.

⁴⁵ *Id.* at 14225, 14258, paras. 3, 69.

⁴⁶ *Id.* at 14295, para. 136.

⁴⁷ *Id.* at 14258, para. 69.

⁴⁸ *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16848-49, para. 15.

⁴⁹ See *AT&T-BellSouth Merger Order*, para. 222, n.614 (citing Appendix F). We note that AT&T also committed to reduce the rates of certain special access services for 39 months, including services offered under Phase II pricing flexibility as well as Ethernet services, including OPT-E-MAN. See *AT&T-BellSouth Merger Reconsideration Order*, para. 5.

rates remain subject to Part 61, subparts E and F of the Commission's rules.⁵⁰ These rules protect against unreasonable rate increases by requiring LECs to justify any increase by providing cost and other supporting data in the tariff review process.⁵¹ We note that AT&T bases its petition on its contention that the advanced services market is competitive and its need to be able to offer lower rates to meet competition.⁵² Accordingly, if, after AT&T enters into contracts for these advanced services on more favorable terms, it should seek to raise its generally available tariffed rates for the same services, such a filing would be reviewed with particular scrutiny.

12. We note that AT&T requests that, as part of any waiver, it be able to exercise pricing flexibility for future packet-technology-based services that are introduced through its LECs as long as it complies with the "new services" rules.⁵³ Generally, these rules permit a price cap carrier to seek pricing flexibility for a service at the time that it is introduced.⁵⁴ Consistent with the relief that the Commission granted in the *Verizon Advanced Services Waiver Order*, the waiver granted here shall extend to any new advanced services that AT&T may introduce in the future in MSAs where it has qualified for, or seeks, pricing flexibility.⁵⁵ Specifically, these services will be eligible for treatment as "new services" within the meaning of rule 69.729 and paragraph 173 of the *Pricing Flexibility Order*.⁵⁶

13. Also consistent with the Commission's findings in the *Verizon Advanced Services Waiver Order*, we find that a competitive showing is necessary for Phase II relief.⁵⁷ Because we waive the general requirement that the advanced services at issue be incorporated into price caps before being eligible for pricing flexibility, AT&T may, in a subsequent proceeding, apply for Phase II pricing flexibility for advanced services in areas where it already has qualified for pricing flexibility for special access services by satisfying the applicable competitive triggers.⁵⁸

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that, pursuant to authority contained in sections 1, 2, 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, and the authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the *Pricing Flexibility Order*

⁵⁰ See 47 C.F.R. Part 61, Subparts E & F.

⁵¹ *Id.*

⁵² See AT&T Nov. 15 *Ex Parte* Letter at 3.

⁵³ AT&T Nov. 15 *Ex Parte* Letter at 5 (citing 47 C.F.R. § 69.729(a), (b)).

⁵⁴ See 47 C.F.R. § 69.729.

⁵⁵ *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16850, para. 17. The relief that is granted here does not apply to Digital Subscriber Line, government services, promotions, and specialized services, which were excluded from the relief granted in the Verizon proceeding. *Id.* at n.81.

⁵⁶ 47 C.F.R. § 69.729; *Pricing Flexibility Order*, 14 FCC Rcd at 14310, para. 173. The waiver we grant will permit AT&T to qualify for Phase I pricing flexibility for new advanced services that may be introduced in the future in areas where AT&T has obtained, or applied for, pricing flexibility for other special access services. See 47 C.F.R. § 69.729; *Pricing Flexibility Order*, 14 FCC Rcd at 14310, para. 173. Paragraph 173 contemplates a price cap LEC demonstrating that the new service falls within a price cap basket and service band for which the LEC already has been granted pricing flexibility. *Pricing Flexibility Order*, 14 FCC Rcd at 14310, para. 173. AT&T will be required to make an analogous showing in light of the factors discussed in this order. Likewise, the carrier must comply with the provisions of rules 69.729(a) and (b), as applicable. See 47 C.F.R. § 69.729(a), (b).

⁵⁷ *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16850, para. 18.

⁵⁸ See *id.*

requirement that a service must be in price caps before it is eligible for pricing flexibility IS WAIVED with respect to the advanced services offered under AT&T Inc.'s local exchange carrier tariffs, as set forth herein.

15. IT IS FURTHER ORDERED that, pursuant to authority contained in sections 1, 2, 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, and the authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, waiver of sections 1.774, 69.709(b), 69.711(b), and 69.727(a) of the Commission's rules, 47 C.F.R. §§ 1.774, 69.709(b), 69.711(b), and 69.727(a), IS GRANTED to the extent necessary to allow AT&T Inc. to exercise Phase I pricing flexibility with respect to the advanced services offered under the carrier's local exchange carrier tariffs, as set forth herein.

16. IT IS FURTHER ORDERED that, pursuant to authority contained in sections 1, 2, 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), and the authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, this order IS EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Navin
Chief, Wireline Competition Bureau