DISSENTING STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: Special Access for Price Cap Local Exchange Carriers, et al,, WC Docket No. 05-25, RM-10593, WCB Pricing File Nos. 12-04, 12-5, 12-06, Report and Order

Since at least February 2007, I have called upon the Commission to seek detailed and up-to-date special access market data, in part, to ensure that any potential changes to the special access rules would be transparent and legally-sustainable.[1] I have long maintained that the Commission must have granular data from *all* players in the special access market, no matter their technology or market position, on a building-by-building and cell-site-by-cell-site basis. Not only would such an approach be appropriate, it would be consistent with the prudent past practices of the federal government when examining the special access market. For instance, the Department of Justice, in close consultation with FCC staff, routinely conducted detailed data collections and analyses during its reviews of the Verizon-MCI, SBC-AT&T and AT&T-BellSouth mergers. Furthermore, the Commission has undertaken many complex data collections in reviewing various mobile wireless and media transactions. Despite this sound tradition of seeking and analyzing the most relevant and probative evidence, calls from Members of Congress, commissioners, industry and civil society for a comprehensive data collection and analysis in the course of contemplating a change in special access rules have gone unanswered for more than five years.

Today, the majority has opted to suspend a thirteen-year-old special access regulatory framework without an adequate evidentiary record or market analysis, both of which are necessary to make such a sweeping rule change. In doing so, the majority chose to lay its procedural path backwards. Due to such glaring deficiencies, I have no choice but to respectfully cast a dissenting vote.

Curiously, while adopting a substantive rule change today, only months ago the Commission admitted that the record in this proceeding was insufficient to render a substantive decision. In fact, in an attempt to remedy that ongoing deficiency, the Wireline Competition Bureau has sought data over the past three years regarding the special access marketplace by soliciting *voluntary* submissions.[2] Yet, the Commission has consistently determined that these efforts failed to harvest the evidence needed to sustain a substantive rule change, explaining as much to the U.S. Court of Appeals for the District of Columbia Circuit. Specifically, the Commission reported last fall that the pending special access rulemaking "involves intensely fact-bound issues . . . [which]

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[1] In fact, in response to a May 23, 2007, letter from Congressman Edward Markey, I indicated that I supported completing review of the record necessary to adopt a special access order by September 15, 2007.

[2] *See Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, 24 FCC Rcd 13638 (2009); *Data Requested in Special Access NPRM,* 25 FCC Rcd 15146 (2010); *see also Clarification of Data Requested in Special Access NPRM,* 25 FCC Rcd 17693 (2010); *Competition Data Requested in Special Access NPRM*, 26 FCC Rcd 14000 (2011).

cannot adequately be addressed until the Commission itself compiles an evidentiary record that is sufficient to evaluate current conditions in the special access market."[3] The Commission further stated that "[w]hile the agency has made progress toward building a sufficient evidentiary record, its efforts have been impeded by the failure of some parties to produce information clearly documenting their claims that special access rates are unreasonable."[4] The majority claims that, since the FCC filed this brief with the D.C. Circuit, additional data has been submitted into the record in this proceeding. At the same time, the majority acknowledges that the FCC needs more specific data to fully resolve this rulemaking. They cannot have it both ways.

Next, this order purports to be an "interim" change, but, as is often the case with "interim" FCC orders, the Commission neglects to reveal how long this "interim" period will last. Literally, no end is in sight. "Interim" solutions often turn into long-term changes or sometimes even effectively permanent regulations. For example, in 2008, the FCC adopted an "interim" cap on universal service funding for competitive eligible telecommunications carriers[5] with the hope that comprehensive universal service reform would be adopted within months. In reality, however, the "interim" rule change, which I supported, lasted approximately three and a half years, a length of time I never anticipated. Another example is the Commission's adoption in 1998 of the "interim" wireless interstate revenue safe harbor which is still in effect today -- and still referred to as "interim."[6]

In fact, the Commission has been considering changes to the special access rules since 2002, when AT&T filed a petition for rulemaking,[7] yet has not acted in the ensuing decade. Experience has taught us that the Commission is quite capable of measuring the frequency of its actions on special access matters in geologic time. Accordingly, my expectation that the Commission will act with alacrity now that it has implemented

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[3] Opposition of the Fed. Commc'ns Comm'n to Petition for Writ of Mandamus at 1, *In re COMPTEL, et al*., No. 11-1262 (D.C. Cir. filed Oct. 6, 2011).

[4] *Id.* at 2.

[5] *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, Order, 23 FCC Rcd 8834, para. 1 (2008).

[6] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21257, para. 11 (1998) (establishing an "interim safe harbor" percentage rate for revenue calculations of certain universal service fund contributors); *Federal-State Joint Board on Universal Service et al.*, CC Docket Nos. 96-45 *et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24954, para. 1 (2002) (increasing the "interim safe harbor" percentage rate for the revenue calculations of certain wireless universal service contributors); *Universal Service Contribution Methodology et al.*, WC Docket No. 06-122 *et al.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7520, para. 2 (2006) (further increasing the "interim safe harbor" percentage rate for the revenue calculations of certain wireless universal service contributors).

[7] AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593 (Filed on October 15, 2002).

"interim" rule changes is low. In short, this "interim" rule change is constructively permanent yet lacks a proper evidentiary foundation. By all appearances, the majority is wrapping its decision in the protective cloak of "interim" status merely to increase its odds of success during the inevitable appeal.

Additionally, perhaps as a harbinger of future inaction, today's order does *not* include the mandatory data request many had expected. To be fair, the order indicates that the Commission will issue a data request within 60 days, however, this process should have been *completed* by now. The Commission has been working on this project for years and it offers no defensible reason as to why it needs even more time to issue a mandatory data collection. Moreover, as the order concedes, because the data collection will be subject to Office of Management and Budget approval under the Paperwork Reduction Act, final resolution of merely the initiation of the data harvest could be months away. The federal government's glacial athleticism is on full display.

In sum, adopting a "temporary" rule suspension without an appropriate data collection and market analysis is procedurally and substantively deficient and could create tremendous market uncertainty, therefore deterring investment in critical broadband backhaul infrastructure.[8] Nevertheless, I urge the Commission to move quickly with its upcoming mandatory data collection and market analysis so that it can make fully-informed decisions as to whether and how the special access rules should be changed, all in the absence of preconceived outcomes. As a matter of good government, such reasoned resolution is long overdue.

For all of these reasons, I respectfully dissent.

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[8] *See, e.g.,* Letter from Edwin D. Hill, International President, International Brotherhood of Electrical Workers, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed June 8, 2009) (new price controls on special access "would undermine investment, hurt competition and dampen incentive for telephone companies to invest further in their networks, which may slow the deployment of broadband services.").