IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re AT&T Corp., et al,	)	
	)	No. 03-1397
Petitioners	)	

OPPOSITION OF
THE FEDERAL COMMUNICATIONS COMMISSION TO
PETITION FOR WRIT OF MANDAMUS

INTRODUCTION

This case involves a challenge to the Federal Communications Commission's special access pricing rules upheld by this Court in *Worldcom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001). Nonetheless, less than three years later, petitioners – AT&T and other purchasers of special access services[1] – seek a writ of mandamus ordering the FCC to (1) issue a notice of proposed rulemaking vacating its special access pricing rules and adopting new rules to govern special access rates; and (2) rule on petitioners' request for interim relief from those rules. Petitioners' request should be denied.

The Commission's special access pricing rules were adopted as part of the Commission's efforts to deregulate in response to growing competition

---

[1] Besides AT&T Corp. ("AT&T"), the other petitioners include AT&T Wireless Services, Inc.; the Comptel/ASCENT Alliance; the Information Technology Association of America; and the eCommerce and Telecommunications Users Group.

in telecommunications. Building on the Commission's decision to replace rate of return regulation with price cap regulation, see *National Rural Telecomm. Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993), the rules permit additional pricing flexibility for special access services when certain competitive thresholds are met in a given metropolitan area. *See generally* Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*"). Phase I relief, which permits LECs to "offer contract tariffs and volume and term discounts, while remaining subject to some price cap rules and tariff requirements," *Worldcom*, 238 F.3d at 455, is available upon a showing of a certain amount of investment by competitors, evidenced by a certain percentage of collocation of competitors' equipment.[2] Phase II relief, which gives LECs "greater freedom to raise and lower rates outside of price cap regulation," *id*. at 456, requires a showing that there has been a greater percentage of collocation. In *Worldcom*, this Court held that the Commission "made a reasonable policy determination that collocation was a sufficient proxy for market power in determining whether to grant pricing flexibility to LECs." 238 F.3d at 452.

[2] Collocation refers to the placement of equipment of competitive local exchange carriers (CLECs) in the premises of ILECs in order to give CLECs access to the ILECs' networks. *See generally* 47 U.S.C. § 251(c)(6); *Verizon Telephone Companies v. FCC*, 292 F.3d 903 (D.C. Cir. 2002) (upholding Commission's most recent collocation order).

In October 2002, less than two years after this Court issued its decision in *WorldCom*, AT&T filed a petition for rulemaking asking the FCC to institute a rulemaking to vacate the *Pricing Flexibility Order* and to grant extra ordinary interim relief pending the outcome of the rulemaking. A little more than a year later, AT&T and the other petitioners filed a petition for mandamus to compel the Commission to grant the relief requested in AT&T's rulemaking petition "within 45 days." Petition for a Writ of Mandamus ("Petition") at 30.

The petition for a writ of mandamus should be denied. The Commission has not unreasonably, much less "egregiously," delayed acting upon the pending NPRM request, *see Telecommunications Research and Action Center ("TRAC") v. FCC*, 750 F.2d 70, 72 (D.C. Cir. 1984). AT&T's rulemaking request arrived at the Commission less than two years after this Court in *WorldCom* upheld the special access pricing regulations adopted by the Commission in its *Pricing Flexibility Order*, has been pending for less than a year-and-a-half, and rests upon complicated – and controverted – factual assertions and legal conclusions. Under these circumstances, and given the Commission's limited resources and competing responsibilities, such a lapse of time is hardly unreasonable.

The interim relief sought by petitioners from the Commission is even more unjustified. Petitioners' request for interim relief necessarily assumes that they will prevail in their efforts to undo the Commission's pricing flexibility rules (even though this Court rejected such a challenge in *WorldCom*). Moreover, the request goes far beyond seeking to restore the status quo that existed prior to the implementation of pricing flexibility, and instead seeks to reinitialize price caps for special access at an 11.25 percent rate of return based on today's costs. Finally, insofar as petitioners' claims are that the ILECs are charging excessive rates in violation of 47 U.S.C. 201(b), they have an adequate legal remedy for challenging ILEC rates by filing a complaint pursuant to 47 U.S.C. 208. *See*, *e.g.*, *Pricing Flexibility Order*, 14 FCC Rcd at 14291-93 (paras. 127, 129, 131). In short, petitioners' claims do not present a proper occasion for the "extraordinary remedy" of mandamus. *TRAC*, 750 F.2d at 78.

COUNTERSTATEMENT

1. Special Access Services

Local telephone service is provided by local exchange carriers ("LECs"). *See* 47 U.S.C. 153(26). Long distance service is provided by, among other carriers, interexchange carriers ("IXCs") such as petitioner AT&T Corp. Generally, for a long-distance call to occur, a series of connections is necessary: "the LEC connects the call from the caller to a switch or 'end office,' which is in turn connected to a 'serving wire center' (SWC), which is itself connected to an interconnection point, or 'point of presence' (POP), with the long distance carrier." Then the "same series of connections will also be made at the receiving end of the phone call – from POP to SWC to switch to call recipient." *WorldCom*, 238 F.3d at 453. In order to reach their customers, therefore, IXCs "must have 'access' to the local networks at both the originating and receiving end of the call in order to complete the connection." *Id*. IXCs pay LECs for this access service, *see* 47 C.F.R. Part 69, and bill their customers directly for long distance calls.[3]

Part 69 establishes two basic categories of access services: special access services and switched access services. *Pricing Flexibility Order*, 14 FCC Rcd at 14226 (para. 8). This Court explained in *WorldCom* that "[s]witched access service requires the creation of a connection between the caller and the long distance company on a 'call-by-call' basis," while special access service "uses dedicated lines between the customer and the IXC's local" point of presence. 238 F.3d at 453. Because special access services employ dedicated facilities, special access is typically used by IXCs and

[3] Many LECs now provide long distance service. *See* RBOC Applications to Provide In-region, InterLATA Services Under Section 271, http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/.

large businesses with high traffic volumes. *See Pricing Flexibility Order*, 14 FCC Rcd at 14296-97 (para. 142).

Historically incumbent LECs ("ILECs") dominated access service markets. *WorldCom*, 238 F.3d at 453. In the 1980s, competitive access providers ("CAPs") challenged the ILEC monopolies and began to offer limited end-to-end special access services in competition with ILECs by building their own transport facilities in order to serve IXCs. *See Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7373 (1992), *recon.*, 8 FCC Rcd 127 (1993), *rev'd in part and remanded in part*, *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441(D.C. Cir. 1994). In 1992, the Commission adopted rules that enabled CAPs to "collocate" their equipment at ILEC's wire centers and to interconnect their facilities there with the ILEC's network. 7 FCC Rcd at 7372. These rules were the first of a series of FCC "expanded interconnection" orders providing opportunities for interstate access competition against the ILECs.

In 1996, Congress enacted the Telecommunications Act of 1996 ("1996 Act") to "promote competition and reduce regulation in order to secure lower prices and higher quality services for . . . consumers and [to] encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (Introductory Statement). The 1996

Act requires ILECs to give competitors access to the ILECs' local networks, *see* 47 U.S.C. 251-252, and to permit competitors to collocate their facilities on the ILECs' premises. *Id*. at 251(c)(6). *See generally Verizon Telephone Companies v. FCC*, 292 F.3d 903 (D.C. Cir. 2002) (upholding Commission's most recent collocation order).

2. Regulatory Framework

For many years, ILECs and other carriers had been subject to rate of return regulation. This Court explained in *National Rural Telecom. Association v. FCC* that "[r]ate-of-return regulation is based directly on cost. Firms so regulated can charge rates no higher than necessary to obtain 'sufficient revenue to cover their costs and achieve a fair return on equity.'" 988 F.2d 174, 177-78 (D.C. Cir. 1993). In October 1990, the Commission replaced this type of regulation for the largest LECs (including the Bell Operating Companies, or "BOCs") with an incentive-based system employing price ceilings or "caps" on the aggregate prices the carriers charge for their interstate offerings. *See WorldCom*, 238 F.3d at 453-54. The Commission decided to replace rate of return regulation because, among other things, it creates "perverse" cost incentives that discourage innovation, "creates incentives for cost shifting that may defeat [its] regulatory purpose," and is expensive to administer. *National Rural Telecom. Association*, 988 F.2d at 178.

The price cap system, codified in part 61 of the Commission's rules, is 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. *Pricing Flexibility Order*, 14 FCC Rcd at 14227 (para. 11). Price cap regulation works by imposing a "'cap' on aggregate prices charged by LECs for certain services in a given area." *WorldCom*, 238 F.3d at 453 (citing 47 C.F.R. 61.41-.49). Under the price cap system, "companies are relatively free to set their own prices so long as they remain below the cap." *WorldCom*, 238 F.3d at 454. "A company can raise the price for one service so long as that increase is offset by a price decrease in another. Prices that are below upper price 'bands' for a given service are also presumed lawful and given streamlined review by the FCC." *Id*. (citing *Bell Atlantic Telephone Companies v. FCC*, 79 F.3d 1195, 1198 (D.C. Cir. 1996)).

Carriers subject to price cap regulation, including the BOCs, are classified as "dominant" carriers and are subject to tariff requirements. Such carriers must publish rate changes, or tariffs, before they go into effect. *WorldCom*, 238 F.3d at 454 (citing 47 U.S.C. 203(a), 204(a)).

3. The *Pricing Flexibility Order*

In August 1999, the Commission issued the *Pricing Flexibility Order*. This order "granted immediate pricing flexibility for some services and set competition thresholds to trigger additional relaxation of regulatory controls." *WorldCom*, 238 F.3d at 454. With respect to increased pricing flexibility in the future, the Commission adopted a framework providing for rate relief in two phases and on a Metropolitan Statistical Area ("MSA") basis.[4]

To obtain pricing flexibility under Phase I or Phase II, the price cap LEC must file a petition demonstrating that certain competitive "triggers" have been met within the MSA. The triggers vary depending upon the degree of relief requested and on the services for which pricing flexibility is sought, and they "measure market competition based upon investments in infrastructure by potential competitors." *WorldCom*, 238 F.3d at 455. The triggers employed by the Commission evaluate the extent to which competitors have collocated their facilities within the MSA. The Commission reasoned that, for special access and dedicated transport services, the presence of operational collocation arrangements provided the most reliable, verifiable, and available indicator of competitive pressures within the MSA. *Pricing Flexibility Order*, 14 FCC Rcd at 14262-70 (paras. 78-87); *see also WorldCom*, 238 F.3d at 457 ("the FCC determined that the collocation level is an 'easily verifiable, bright-line test' that serves 'to avoid excessive administrative burdens.'") (citation omitted).

A LEC that obtains Phase I relief "may offer contract tariffs and volume and term discounts, while remaining subject to some price cap rules and tariff requirements." *WorldCom*, 238 F.3d at 455.[5] Price cap carriers that obtain Phase I relief must make contract tariff rates available to all similarly situated customers, and must make discounts available to anyone willing to commit to the specified volumes or term. *Pricing Flexibility Order*, 14 FCC Rcd at 14289, 14292 (paras. 124, 130). Furthermore, a LEC that obtains Phase I relief remains subject to FCC enforcement actions and to complaints brought pursuant to 47 U.S.C. 208. *Id*. at 14290-91, 14292-93 (paras. 127, 131).

---

4 Each area within the United States is classified as either an MSA or an "RSA" (Rural Services Area). 47 C.F.R. 22.909.

5 "In order to obtain Phase I relief for dedicated transport services an incumbent LEC must show collocation in fifteen percent of wire centers within the MSA in which relief is sought, or in wire centers accounting for at least thirty percent of revenues for services in question. In addition, at least one competitor must rely on transport facilities provided by a non-incumbent LEC in each wire center relied on in the applicant LEC's petition. Phase I relief is available for channel terminations upon a showing of collocation in fifty percent of wire centers within the MSA in which relief is sought or in wire centers accounting for at least sixty-five percent of revenues for services in question." *Worldcom,* 238 F.3d at 455-56 (citations omitted); *see also Pricing Flexibility Order*, 14 FCC Rcd at 14258-59 (para. 70); 47 C.F.R. 69.709(b), 69.711(b), and 69.713(b).

The *Pricing Flexibility Order* establishes more stringent triggers for Phase II relief.[6] In this second phase, once the triggers are satisfied, "LECs are given greater freedom to raise and lower rates outside of price cap regulation." *WorldCom*, 238 F.3d at 456. Nonetheless LECs still "must file generally available tariffs and remain subject to FCC enforcement actions for anticompetitive behavior." *Id*.

In short, to obtain pricing relief, a LEC must show "'that competitors have made irreversible investments in the facilities needed to provide the services at issue, thus discouraging incumbent LECs from successfully pursuing exclusionary strategies.'" *WorldCom*, 238 F.3d at 455 (quoting *Pricing Flexibility Order*, 14 FCC Rcd at 14258 (para. 69)).

The Commission acknowledged that its pricing flexibility rules could allow for "Phase II relief before the manifestation of actual competitive alternatives for interstate access service customers" but nevertheless concluded that "'the costs of delaying regulatory relief outweigh the potential costs of granting it before IXCs have a competitive alternative for

---

6 This Court detailed the specific showing a LEC must make in order to obtain Phase II relief in *WorldCom*: "[T]o obtain Phase II relief for dedicated transport services an incumbent LEC must show collocation in fifty percent of wire centers within the MSA in which relief is sought or in wire centers accounting for at least sixty-five percent of revenues for services in question. In addition, as with Phase I relief, at least one competitor must rely on transport facilities provided by non-incumbent LECs in each wire center relied on in the applicant LEC's petition. Phase II relief is available for channel terminations upon a showing of collocation in sixty-five percent of wire centers within the MSA in which relief is sought or in wire centers accounting for at least eighty-five percent of revenues for services in question." *See* 238 F.3d at 456 (citations omitted); *see also* 47 C.F.R. 69.709(c) and 69.711(c).

each and every end user.'" *Id*. (quoting *Pricing Flexibility Order*, 14 FCC Rcd at 14297-98 (para. 144)). In establishing the specific thresholds for Phase I and Phase II relief, the Commission acknowledged that it was not engaged in "an exact science." *Pricing Flexibility Order*, 14 FCC Rcd at 14276 (para. 96). It explained that "the thresholds are policy determinations based on our agency expertise, our interpretation of the record before us in this proceeding, and our desire to provide a bright-line rule to guide the industry." *Id*.

4. The *WorldCom* Decision

After the Commission issued the *Pricing Flexibility Order*, a number of long distance telephone service providers – including WorldCom, AT&T, and Time Warner – filed a petition for review of the order. Among other things, petitioner asserted that the Commission acted in an arbitrary and capricious manner by "basing the triggers for pricing flexibility on collocation rather than an analysis of actual competitive conditions," and by "selecting specific triggers in arbitrary fashion and without sufficient explanation." *WorldCom*, 238 F.3d at 457.

In February 2001, this Court rejected all of the petitioners' claims. *WorldCom*, 238 F.3d 449. Acknowledging that price cap regulation "'involves policy determinations in which the agency is acknowledged to have expertise,'" the court applied a deferential standard of review in evaluating the Commission's policy judgment. *Id*. at 457-58 (citing *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 163 (D.C. Cir. 1995)).

This Court upheld the Commission's decision to use "collocation as a proxy for competition in access service." *WorldCom*, 238 F.3d at 458. It acknowledged that collocation may be an inexact measure of market share but noted that the Commission "has long held that market share is not the be-all, end-all of competition." *Id*. Moreover, the court found that the Commission had examined a number of alternatives for measuring competition before adopting the collocation measure, and that the Commission reasonably rejected the alternative measure put forward by petitioners – "a painstaking analysis of market conditions such as that which is required when an LEC seeks classification as a non-dominant carrier" – as "burdensome and time-consuming." *Id*. at 459. The court was not troubled by the fact that the Commission's reasoning in the *Pricing Flexibility Order* "was dependent, at least in part, on the agency's predictive forecasts." *Id*. It noted that such predictions are permissible as part of the agency's exercise of its expertise in formulating policy, and that "a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view." *Id*. (citation omitted).

As to the specific collocation thresholds selected by the FCC, the court rejected petitioners' arguments as nothing more than a disagreement over policy. The court found that the Commission made a reasonable predictive judgment after reviewing evidence about the relationship between collocation and competition, including an examination of "areas where there was substantial collocation to determine whether that correlated with substantial involvement in competitive transport facilities." *Id*. at 462 (citing *Pricing Flexibility Order*, 14 FCC Rcd at 14265-66, 14274-75 (paras. 81, 95)).

5. Developments Subsequent to *WorldCom*

BellSouth received a grant of pricing flexibility in December 2000, before this Court decided *WorldCom*. Subsequent to this Court's decision, Verizon and SBC received pricing flexibility grants in March 2001, and Qwest received a grant in April 2002. *See* Opposition of SBC Communications, *In the Matter of AT&T Corp*., RM No. 10593 (Dec. 2, 2002) ("SBC Opp.") at 19. With each BOC, some of the pricing flexibility grants at each date were for Phase II relief. *See* Declaration of Alfred E. Kahn and William E. Taylor on behalf of BellSouth Corp., Qwest Corp., SBC Communications, Inc., and Verizon, *In the Matter of AT&T Corp*., RM No. 10593 (Dec. 2, 2002) at 19.

On October 15, 2002, less than a year-and-a-half after the *WorldCom* decision, AT&T filed a petition for rulemaking in which it requested that the Commission revise its special access rate regulations, specifically asking the agency "to revoke pricing flexibility and reinitialize price caps to levels designed to produce normal, rather than monopoly, returns." *See* Petition for Rulemaking, *In the Matter of AT&T Corp*., RM No. 10593 (Oct. 15, 2002) ("AT&T Petition") at 6.[7] In addition, AT&T requested interim relief in the form of a reduction of all special access rates subject to Phase II pricing flexibility to levels that would produce an 11.25 percent rate of return, and a moratorium on consideration of further pricing flexibility applications pending completion of the rulemaking. *Id*.

AT&T's rulemaking petition prompted substantial responses from the ILECs, in which the incumbents challenged the factual assertions made and legal conclusions proposed by AT&T. We describe in detail below the claims made by AT&T and other purchasers of special access, and the responses made by the ILECs; for now, we note only that the matters raised by AT&T in its rulemaking request are both complicated and controverted, and that the request has generated an active docket.

---

7 We have made available for the Court in the accompanying appendix a copy of the AT&T petition for rulemaking as well as the other pleadings in response to the rulemaking request cited in our opposition.

ARGUMENT

Before the Commission, AT&T – supported by other purchasers of special access – filed a petition for rulemaking asking the FCC to institute a rulemaking to vacate the *Pricing Flexibility Order* and to grant extraordinary interim relief pending the outcome of the rulemaking. Now petitioners seek a writ of mandamus ordering the FCC to issue a notice of proposed rulemaking vacating its special access pricing rules and adopting new rules to govern special access rates, and to rule on their request for interim relief from those rules.

A. The Standard For Obtaining Mandamus.

This Court has explained that "[m]andamus is an extraordinary remedy, warranted only when agency delay is egregious." *In re Monroe Communications Corp.,* 840 F.2d 942, 945 (D.C. Cir. 1988). *See also Kerr v. United States District Court*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976) (mandamus is a drastic remedy appropriate only in "extraordinary situations"). Furthermore, this Court has recognized that an "agency has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing." *Cutler v. Hayes*, 818 F.2d 879, 896 n. 150 (D.C. Cir. 1987). The Commission's decision to initiate a rulemaking is "largely committed to the discretion of the agency," and "the scope of review of such a determination" is "very narrow." *WWHT, Inc. v. FCC*, 656 F.2d 807, 809 (D.C. Cir. 1981).

In assessing whether an agency's delay in a particular case is so egregious as to warrant mandamus, this Court typically considers the factors set forth in *TRAC*, which provide "the hexagonal contours of a standard":

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

TRAC, 750 F.2d at 80 (citations omitted). *TRAC* remains the governing authority with respect to the availability of mandamus in this Circuit. *See, e.g., In re United Mine Workers of America International Union*, 190 F.3d 545, 549 (D.C. Cir. 1999) ("[i]n exercising our equitable powers under the All Writs Act, we are guided by the factors outlined in" *TRAC* "for assessing claims of agency delay").[8]

B. The Commission Has Not Unduly Delayed Acting on AT&T's Petition For Rulemaking

AT&T's rulemaking petition has not been pending before the agency for an egregiously long time. AT&T's rulemaking request arrived at the Commission less than two years after this Court in *WorldCom* upheld the special access pricing regulations adopted by the Commission in its *Pricing Flexibility Order*, has been pending for less than a year-and-a-half, and rests upon complicated – and controverted – factual assertions and legal conclusions. Under this set of circumstances, the Commission has not unreasonably delayed by not yet acting on the rulemaking request. Application of all of the *TRAC* factors confirms this conclusion.

[8] Petitioners apparently seek to avoid application of *TRAC* by characterizing their claim as agency action "unlawfully withheld" (as well as " unreasonably delayed") pursuant to 5 U.S.C. 706(1). Petition at 22. This effort to avoid application of the *TRAC* factors is unavailing. *TRAC* itself interpreted the court's jurisdiction under the All Writs Act as informed by section 706(1). *See* 750 F.2d at 77 ("section 706(1) coupled with section 555(b) does indicate a congressional view that agencies should act within reasonable time frames and that courts designated by statute to review agency actions may play an important role in compelling agency action that has been improperly withheld or unreasonably delayed."); *cf*. Pet. Br. at 23 (citing *TRAC*). In any event, the distinction between agency action "unlawfully withheld" or "unreasonably delayed" depends upon whether Congress imposed a deadline on agency action for a date certain. *See*, *e.g.*, *Forest Guardians v. Babbitt*, 164 F.3d 1261 (10th Cir. 1998). Here, Congress has not imposed such a deadline, so the only question is whether the Commission has unreasonably delayed acting on the rulemaking request.

First, it is beyond dispute that the issues raised by AT&T in its rulemaking request are complicated and controverted. In its rulemaking petition, AT&T has asserted that: (1) the ILECs' special access rates were grossly excessive and unlawful, and becoming more so;[9] (2) the ILECs' excessive special access rates had substantial anticompetitive effects;[10] and (3) IXCs and CLECs had no alternative but to purchase special access service from the ILECs;[11] and (4) the Commission had a duty under 47 U.S.C. 201 and 202 to ensure that special access rates were just and reasonable.[12]

The ILECs responded that their special access rates were not excessive and therefore not unlawful, and challenged the evidence put forward by AT&T in a number of ways. First, noting that "BOCs only

---

9 *See*, *e.g.*, AT&T Petition at 10 ("returns calculated from the Bells' ARMIS reports, as high as they are grossly *understate* the extent of the Bells' special access tax on American consumers and businesses.") (emphasis in original); *id*. at 11 ("Any possible doubt about the Bells' pervasive market power should be put to rest by the overwhelming evidence that the Bells have, without exception, maintained or even *raised* their special access prices when given flexibility to do so and have had no trouble retaining their customers – and indeed greatly *increasing* sales – in the wake of those price increases.") (emphasis in original).

10 Specifically, AT&T claimed that the excessive rates impeded the ability of competitive LECs ("CLECs") to self-deploy alternative transmission facilities, *see* AT&T Petition at 18-20; that the existing special access regulatory regime permitted the ILECs to engage in exclusionary pricing behavior and to engage in customer foreclosure, *see id.* at 18-23; and that the ILECs' excessive special access rates had an anticompetitive impact on the long distance market, *see id*. at 23-24. AT&T also claimed that "experience now shows that the Commission's belief that its pricing flexibility triggers 'measure the extent to which competitors have made sunk investment in facilities used to compete with incumbent LECs' was erroneous." *Id*. at 20.

11 AT&T Petition at 25-33.

12 AT&T Petition at 33-41.

began to take advantage of pricing flexibility in 2001," Verizon asserted that "AT&T's 'evidence' regarding BOC special access revenues and earnings since adoption of the pricing flexibility framework say nothing about the impact of pricing flexibility." Opposition of Verizon, *In the Matter of Petition for Rulemaking*, RM No. 10593 (Dec. 2, 2002) ("Verizon Opp.") at 16.[13] Second, the ILECs urged the Commission to reject AT&T's assertions regarding excessive rates because they were calculated using data from ARMIS reports.[14] *See also Pricing Flexibility Order*, 14 FCC Rcd at 14303-307 (paras. 160-68) (noting potential difficulties with accurately calculating interstate earnings following grant of pricing flexibility). Third, citing the analysis of its expert economists as well as the comments of an independent competitive access provider (Time Warner Telecom), the ILECs insisted that the use of collocation-based triggers does in fact serve as an accurate proxy for predicting competition. *See* Verizon Opp. at 9-10, 13. More generally, they claimed that there is ample evidence of extensive competition in the

---

[13] *See also* Verizon Opp. at 19 ("the levels and trends of the data proffered by AT&T, which were clear at the time the *Pricing Flexibility Order* was adopted, did not spike up following pricing flexibility."). The Verizon Opposition is included in the accompanying appendix.

[14] *See* Verizon Opp. at 21 (asserting that FCC has "emphasized that the disaggregated, category-specific return data reported in ARMIS might be useful for jurisdictional separations and allocating costs between regulated and non-regulated services, but that they 'do[] not serve a ratemaking purpose.'") (quoting *Policy and Rules Concerning Rates for Dominant Carriers*, Order on Reconsideration, 6 FCC Rcd 2637, 2728, 2730 (paras. 194, 198, 1999); *see also* Opposition of SBC Communications, *In the Matter of AT&T Corp.*, RM No. 10593 (Dec. 2, 2002) ("SBC Opp.") at 22. ("the same ARMIS reports on which AT&T relies to support its claim that SBC and the other BOCs have exorbitant rates of return, and thus excessive rates, for special access services show that SBC's regulatory rate of return for switched access services is anemic and falling."). The SBC Opposition is included in the accompanying appendix.

special access market.[15] Fourth, the ILECs insisted that, given the competition in the special access market, they could not and did not engage in anti-competitive behavior. SBC Opp. at 25-29; *see*, *e.g.*, *id*. at 28 ("AT&T's speculations regarding the risk of predatory pricing evaporate when one considers the conditions necessary for such a strategy to succeed.).[16] In addition, they cited the existence of competitive alternatives to ILEC special access services. *Id*. at 32-37. And the record continues to develop. Thus, for example, a group known as the Special Access Reform Coalition ("SPARC") has submitted a 34-page to demonstrate that reducing special access rates to levels that would produce an 11.25 percent return would add $14.5 billion to the Gross Domestic Product and would create 132,000 new jobs in the first two years. But less than a month ago, on December 24, 2003, a number of ILECs submitted to the Commission their 34-page study, with two attachments, challenging the SPARC study. *See*

---

15 SBC specifically asserted that: (1) "the number of carriers reporting to the Commission that they provide competitive access services has grown to 532" and that "these competitors now account for between 28 and 39 percent of all special access revenues." SBC Opp. at 10-11;[15] (2) "competitive service providers [have] deployed a wealth of competitive high-capacity facilities, much of which is used to provide special access services" to the extent that "all but nine of the top 100 MSAs are served by at least three CLEC fiber networks, ..." *Id*. at 11-12; and (3) CLECs have raised capital to build out their networks and deploy fiber. *Id*. at 12-13.

16 SBC elaborated: "First, a LEC would have to reduce its special access rates below cost for a sufficient period to drive all of its competitors out of the market. Next, it would have to snap up all of its competitors out of the market. Next, it would have to snap up all of its competitors' fiber transmission facilities to keep them out of the hands of actual or potential competitors. Then it would have to raise prices sufficiently above competitive levels to recoup its losses. And it would have to achieve all of these steps without attracting any new entry, or the attention and intervention of the Commission or antitrust authorities. Plainly, such a sequence of events is inconceivable." SBC Opp. at 28.

The Macroeconomic Effects of Changing Special Access Line Prices, by Gregory M. Duncan and Mark A. Thomas, on behalf of BellSouth Corp., Qwest Corp., SBC Communications, Inc., and Verizon, *In the Matter of AT&T Corp*., RM No. 10593 (Dec. 2, 2002); *see*, *e.g.*, *id*. at 4 ("the SPARC study does not begin to present an accurate analysis of the effects of the proposed rate reduction on the special access market.").[17]

This summary of the contentions made by the parties before the Commission provides the Court with some sense of the complexity of the issues raised by AT&T in its rulemaking petition, as well as the extent of the controversy between the parties over the special access pricing regulations. Because AT&T's petition has been pending for less than a year-and-a-half and the record continues to evolve, the FCC has not unduly delayed by not yet ruling on the rulemaking request. Indeed, the FCC has not unduly delayed acting on it by any reasonable standard. *See*, *e.g.*, *TRAC*, 750 F.2d at 81 (D.C. Cir. 1984) (delays of two and five years did not warrant mandamus); *see also Wellesley v. Federal Energy Regulatory Comm'n*, 829 F.2d 275, 277 (1st Cir.1987) (delay of fourteen months not unreasonable). The agency now is not required to do more. *See Community Nutrition Institute v. Young*, 773 F.2d 1356, 1361 (D.C. Cir. 1985) ("[m]andamus is an

[17] The studies are included in the accompanying appendix.

extraordinary remedy [and] we require similarly extraordinary circumstances to be present before we will interfere with an ongoing agency process.”).

Second, although the Commission may have a “duty to evaluate” whether the *Pricing Flexibility Order* has been effective in reducing the special access rates charged by ILECs, *see* Petition at 24, the FCC is under no obligation to resolve the pending rulemaking petition and accompanying request for interim relief by a specific statutory deadline. Accordingly, petitioners have not established that “Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed” on the rulemaking request. *See TRAC*, 750 F.2d at 80.

Moreover, the Commission’s decision on whether to initiate a “rulemaking is one that is largely committed to the discretion of the agency,” and “the scope of review of such a determination” by this Court is “very narrow.” *WWHT, Inc.*, 656 F.2d at 809 (D.C. Cir. 1981); *see also Arkansas Power & Light Co. v. ICC*, 725 F.2d 716, 723 (D.C. Cir. 1984) (“As a general proposition, this court will compel an agency to institute rulemaking proceedings only in extremely rare instances”).

Third, petitioners’ complaint of delay concerns a matter of economic regulation, and “human health and welfare” are not at stake. That fact further limits petitioners’ entitlement to mandamus. *Cf. WWHT, Inc.*, 656

F.2d at 819 (an economic "interest, without more, does not present the unusual or compelling circumstances that are required in order to justify a judgment by this court overturning a decision not to proceed with rulemaking.").

Finally, AT&T's rulemaking request has been pending during a time when the agency has been confronted with a number of more pressing responsibilities. Thus, for example, during the same time that parties were filing comments in response to AT&T's rulemaking request, the Commission has had to resolve two lengthy administrative proceedings involving complex and fundamental policy decisions: local competition and media ownership. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 169781 (2003) (revision of rules governing the unbundling obligations of incumbent local exchange carriers ("ILECs") under 47 U.S.C. 251(c)(3)), *appeal pending United States Telecom Association v. FCC,* No. 00-1012 (and consolidated cases) (D.C. Cir.); *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003) (modification of media ownership rules), *appeal pending*, Prometheus Radio Project v. FCC, No. 03-3388 (3d Cir.). Furthermore, during 2003, the Commission was required to act promptly in order to ensure the establishment and operation of the national do-not-call registry and to issue a number of orders to ensure the implementation of wireless number portability.[18] Finally, the Commission has resolved 27 applications by BOCs to offer long distance service pursuant to 47 U.S.C. 271 – which imposes a statutory deadline of 90 days for the Commission to act once the application has been filed – during the period that AT&T's petition for rulemaking has been pending at the Commission. The Commission's decision to act on more pressing matters rather than resolving AT&T's rulemaking request was not unreasonable.

C. Petitioners Have Not Established That The Commission Has Unduly Delayed Acting On Their Request For Interim Relief Or That They Are Entitled To Interim Relief

Before the Commission, AT&T requested that the agency grant its request for interim relief by immediately reducing "all special access charges for services currently subject to Phase II pricing flexibility to levels that would produce an 11.25% rate of return" and by imposing "a moratorium on consideration of further pricing flexibility considerations." Pet. at 20. The Commission has not acted on that request. Now, before this

[18] Report and Order, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC 14014 (2003), *appeal pending Mainstream Marketing v. FCC* No. 03-9571 (10th Cir.); FCC News Release, FCC Clears Way for Local Number Portability Between Wireline and Wireless Carriers (released November 10, 2003). The news release is available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241057A1.pdf.

Court, petitioners seek an order requiring the Commission to rule on the request for interim relief. *Id*. at 30.

Petitioners' request for interim relief is derivative of the relief they seek in their request for the Commission to conduct a rulemaking on special access rates. In fact, petitioners' interim relief request is even more extraordinary than their rulemaking request, because it presumes the correctness of their position, and because it goes far beyond seeking to restore the status quo that existed before the implementation of pricing flexibility. However, petitioners plainly are not entitled to interim relief where the result they seek – a complete reworking of the agency's special access rules, after they were upheld by this Court – is not "preordained." *Cf. Radio-Television News Directors Association v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (granting writ of mandamus to vacate rules abandoned by the Commission). As demonstrated above, however, that is certainly not the case given the controverted and complicated record before the Commission.

Moreover, petitioners are not entitled to mandamus on their request for interim relief when they have not established that they are entitled to that relief from the Commission. Purchasers of special access already have available an adequate remedy – the section 208 complaint, *see* 47 U.S.C.

208[19] – for challenging what they believe are unjust and unreasonable special access rates charged by ILECs. *See, e.g., Orloff v. FCC*, --- F.3d ---, 2003 WL 22997793 (D.C. Cir.) (rejecting customer's complaint that commercial mobile radio service provider's sales concession practice was unreasonable under 47 U.S.C. 202). The Commission emphasized this point in the *Pricing Flexibility Order*. *See* 14 FCC Rcd at 14241-42, 14256, 14290-91, 14291-92, 14292-93 (paras. 41, 65, 127, 129, 131).

Furthermore, the relief sought before the Commission is really a request for the prescription of interim rates pursuant to 47 U.S.C. § 205.[20] Even if the current record before the Commission were not controverted as to the reasonableness of the ILECs' special access rates – and it is – it still would not have been sufficient to justify the prescription sought by

---

[19] Section 208 provides: "(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. . . . If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. . . ."

[20] Section 205(a) provides: "Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

petitioners. *See generally* Report and Order, *Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes*, 10 FCC Rcd 6788, 6813 (1995) (para. 51) (in Commission's Represcription Reform Order "almost all parties to this proceeding . . . emphasize that represcription proceedings are adversarial in nature and depend upon a thorough fact-based inquiry that develops a great amount of probative evidence."). Indeed, in order to justify the interim represcription relief sought by petitioners, the record would have to support the conclusion that *every* special access rate in *every* MSA in which Phase II pricing flexibility has been granted violates section 201, and petitioners have not made such a showing.

CONCLUSION

For the foregoing reasons, the petition for writ of mandamus should be denied.

Respectfully submitted,

John A. Rogovin
General Counsel

Jacob M. Lewis
Associate General Counsel

Rodger D. Citron
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

January 9, 2004