

Telecommunications Alert: FCC Seeks Comment on Analytical Framework Necessary To Resolve Issues in the Special Access NPRM WC Docket No. 05-25, RM-10593

11/18/2009

Comments Due: 45 days after the Public Notice appears in the Federal Register

Reply Comments Due: 75 days after the Public Notice appears in the Federal Register

On November 5, 2009, the FCC issued a Public Notice (“Notice”) inviting comment on the appropriate analytical framework necessary to resolve issues raised in the Commission’s 2005 *Special Access NPRM*.¹

Background

In the *Special Access NPRM*, the FCC found it was necessary to conduct a competitive analysis for special access facilities in order to determine whether the FCC’s pricing flexibility rules have worked “as intended” to ensure just and reasonable rates. In the Notice, the FCC states that interested parties have provided very different perspectives on whether the FCC’s de-regulation of special access services based on the number of collocation sites established by competing providers has been successful. Some parties state that the rules are working and that the market for special access is competitive. Others assert that the rules have created a market characterized by “supracompetitive prices and significant overearnings by incumbents.”² With these comments in mind, the FCC seeks a clear explanation of how to use data to determine whether the current price cap and pricing flexibility rules are working properly to ensure just and reasonable rates, terms and conditions to provide flexibility and competition within the market.

Comment Request

The FCC seeks “concrete” recommendations on a suitable analytical framework that will be used to determine if its current special access rules effectively maintain special access rates at

just and reasonable prices. The FCC notes that once it adopts an analytical approach to determine whether the current regulations are effective, it can then determine how to address specific problems (if any) and formulate specific solutions as necessary. The FCC asks for suggestions that are “analytically rigorous,” fact-based and systematic, as well as administratively practical — e.g., requiring a manageable amount of data collection and analysis. The FCC states that any proposed analytical framework should answer key questions raised in the *Special Access NPRM*, including the following:

1. Do the FCC’s pricing flexibility rules ensure just and reasonable rates?
 - (A) Are pricing flexibility triggers, which are based on collocation by competitive carriers, an accurate proxy for the kind of sunk investment by competitors that is sufficient to constrain incumbent LEC prices, including for both channel terminations and inter-office facilities?
 - (B) If so, are the triggers set at an appropriate level?
2. Do the FCC’s price cap rules ensure just and reasonable special access rates?
3. Do the FCC’s price cap and pricing flexibility rules ensure that terms and conditions in special access tariffs and contracts are just and reasonable?

The FCC asks commenters to focus on the analytical framework and include the applicable law that the FCC should use “to arrive at fact-based answers” to each of the key questions listed above. Further, the FCC would like to know whether it can answer the above questions based on existing data in the docket and if so, which data should it examine? If not, what type of data should the FCC collect, from whom, and why? This reflects an ongoing debate between incumbent carriers and competitors regarding the need for additional, site-specific information on competitive deployment of last-mile facilities. It also asks commenters to include administrative concerns such as the obstacles to obtaining and evaluating the specified data and the time frame that would be required to undertake the proposed analysis. Commenters should organize comments by the key question numbers noted above.

The FCC also summarizes some of the analytical frameworks proposed in the current record. It notes that the “examples are not intended to limit the types of analytical framework or data collection parties suggest in responding to the Public Notice.” The FCC asks additional questions related to these suggested analytical frameworks.

Example 1

Market-power analysis

Parties that advocate a market-power analysis should describe the analytical framework that the FCC should “employ to conduct such an analysis, identifying the factors and issues that would be examined as part of that analysis.”³ Parties should comment on the definitional issues related to the factors that the FCC previously recognized as relevant to a market power analysis.⁴

Example 2

Competitive facilities data to show validity of pricing flexibility triggers

The FCC asks whether the “appropriate framework for determining whether collocation is an accurate proxy for sunk investment in channel terminations is to identify every building, by street address, where competitors have facilities, as well as all competitive fiber rings.”⁵ The FCC inquires whether this approach is administratively practical, and if so, asks about the appropriate analysis to undertake. It also seeks comment on what type of data should be collected.

Example 3

Probability that potential competition ensures special access rates remain just and reasonable

The FCC notes that one commenter suggests that the appropriate analytical framework “is to examine the economic feasibility of constructing lateral connections into buildings or cell towers when a competitor has nearby fiber.”⁶ The FCC asks how constraints on capital availability for competitors to construct such facilities should be incorporated into the analysis. It asks: What evidence illustrates that potential competition exists in more than a few locations? And what data is required to conduct a potential competition analysis in every market, and how would such data be collected?

Example 4

Effectiveness of the Commission’s price cap rules in ensuring just and reasonable special access rates

The FCC asks parties that believe that ARMIS data is unreliable and/or not economically meaningful as a measure of profits on special access services to explain why and to propose a different analytical framework for measuring special access profitability. Those that believe that ARMIS data is sufficient to measure special access profits should provide an analytical framework to consider such data. Any proposed framework, whether based on ARMIS data or not, should “include specifics as to the measure of profit and the reasonableness of that profit.”⁷

Example 5

Effectiveness of the Commission’s price cap and pricing flexibility rules in ensuring that terms and conditions in special access tariffs and contracts are just and reasonable.

The FCC states that some parties assert that certain terms and conditions in special access tariffs and contract tariffs are anticompetitive. Others contend that such terms and conditions produce a “net increase in overall consumer welfare.”⁸ The FCC asks parties who assert that particular

terms and conditions are or are not reasonable, to suggest how to analyze the reasonableness of such terms and conditions and what remedial action, if any, the FCC should take.²

Endnotes

¹ The NPRM was initially released in 2005, see *Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd 1994 (2005) (“*Special Access NPRM*”). The FCC also asked for additional comments to refresh the record. See *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, 22 FCC Rcd 13352 (2007).

² Public Notice at 2.

³ Public Notice at 3.

⁴ The FCC notes that the measure of competition is based on “relative market shares, trends in market shares, demand responsiveness, supply responsiveness, pricing behaviors, and price–cost margins.” Public Notice at 3. See also *Special Access NPRM* ¶¶ 73–112.

⁵ Public Notice at 4.

⁶ Public Notice at 4.

⁷ Public Notice at 5.

⁸ Public Notice at 6.

⁹ Public Notice at 6.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

Howard J. Symons

Chair, Communications Practice

(202) 434-7305

HJSymons@mintz.com

Michael H. Pryor

(202) 434-7365

MHPryor@mintz.com

Ernest C. Cooper

(202) 434-7314

ERCooper@mintz.com

Stefanie Z. Desai

(202) 585-3550

SZDesai@mintz.com