ORAL ARGUMENT SCHEDULED FOR OCTOBER 21, 2004

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

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

NO. 03-1397

IN RE AT&T CORP., THE COMPTEL/ASCENT ALLIANCE, ECOMMERCE AND TELECOMMUNICATIONS USERS GROUP, AND THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA,

Petitioners

ON PETITION FOR A WRIT OF MANDAMUS DIRECTING ACTION BY THE FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

BOC	Bell Operating Company
CLEC	Competitive Local Exchange Carrier
ILEC	Incumbent Local Exchange Carrier
IXC	Interexchange Carrier
MSA	Metropolitan Statistical Area
RSA	Rural Services Area

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ON PETITION FOR A WRIT OF MANDAMUS DIRECTING ACTION BY THE FEDERAL COMMUNICATIONS COMMISSION

AT&T Corporation ("AT&T") in October 2002 filed a petition for rulemaking asking the Federal Communications Commission to revisit a set of special access pricing rules that the FCC had adopted in 1999 after four years of rulemaking, and that this Court had affirmed on review in February 2001. *See WorldCom, Inc. v. FCC,* 238 F.3d 449 (D.C. Cir. 2001) ("*WorldCom*"). AT&T also asked the Commission, as an interim matter, to replace the existing rates for special access services with new rates prescribed for immediate application. The Commission has not yet acted on the rulemaking petition or the request for interim rates. On November 6, 2003, AT&T and the other petitioners[1] filed a petition for mandamus in this Court, asking the Court to

[1] The other petitioners besides AT&T are the Comptel/ASCENT Alliance; the Information Technology Association of America; and the eCommerce and Telecommunications Users Group. We refer to the petitioners collectively as "AT&T".

direct the Commission to act on the rulemaking petition and the request for interim rates. After the Commission had responded to the mandamus petition and AT&T had filed its reply, the Court referred the case to a merits panel and required full briefing.

JURISDICTION

The Court has jurisdiction to consider and rule on the mandamus petition pursuant to the All Writs Act, 28 U.S.C. § 1651. *See generally Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*").

STATEMENT OF QUESTION PRESENTED

The sole question for the Court is whether the Commission has unreasonably delayed its consideration of AT&T's petition for rulemaking and interim rates.

COUNTERSTATEMENT

The Commission adopted its special access pricing rules as part of an effort to tailor its regulation to the growing competition 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) *("National Rural Telecomm. Ass'n")*, 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*"). In *WorldCom*, this Court affirmed the pricing flexibility rules, holding that the Commission had "made a reasonable policy determination" concerning indicia of competitive pressure on special access pricing in determining whether to grant pricing flexibility. 238 F.3d at 452.

Since the Court issued its briefing order in this proceeding on March 23, 2004, the Commission and its staff have taken steps toward resolving AT&T's requests. The FCC's Wireline Competition Bureau ("WCB") has drafted a decision memorandum for the Office of the Chairman on this matter, and the Commission can be expected to act on the rulemaking petition in the near future. Because the agency is "moving expeditiously" to act on the rulemaking petition, this Court may deny the mandamus petition without evaluating the "hexagonal" factors set out in *TRAC,* 750 F.2d at 80. In any event, applying the *TRAC* factors, the Commission has not unreasonably, much less "egregiously," delayed acting. *Id.* at 72. That conclusion is compelled by the following facts: (1) this Court in *WorldCom* on direct review upheld the Commission's pricing flexibility rules; (2) the rulemaking petition concerns extremely complicated and controverted matters, and has been pending at the FCC for less than two years; (3) the Commission is not obligated to resolve the pending rulemaking petition by a specific statutory or regulatory deadline; (4) the rules in question concern a matter of economic regulation, and do not implicate "human health and welfare"; and (5) while the rulemaking petition has been pending, the Commission has had to address a number of more pressing responsibilities, including matters on remand from this Court and orders required to be issued pursuant to a statutory deadline.

I. 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.[2] Generally, for a long-distance call to occur, a series of

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

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." *WorldCom*, 238 F.3d at 453. 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." *Id.* In order to serve their customers, 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 pass along the costs of access charges to their own customers as part of their direct charges for long distance calls.

Part 69 establishes two basic categories of access services: special access and switched access. *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. Special access is typically used by IXCs and large businesses with high traffic volumes, which justify the costs of dedicated lines. *See Pricing Flexibility Order*, 14 FCC Rcd at 14296-97 (para. 142). The Commission noted that these "large and sophisticated customers generate significant [access] revenues for the incumbent and are not without bargaining power with respect to the incumbent." *Id*.

For many years, incumbent LECs ("ILECs") were the sole providers of access services. *WorldCom*, 238 F.3d at 453. In the 1980s, however, competitive access providers ("CAPs") began to challenge the ILEC monopolies by offering limited end-to-end special access services over their own transport facilities. *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 wire centers and to interconnect their facilities there with the ILEC 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 adopted the Telecommunications Act of 1996 ("1996 Act"). Pub. L. No. 104-104, 110 Stat. 56, 56. The 1996 Act requires ILECs to give competitors access to the ILECs' local networks, and, in particular, to permit competitors to collocate their facilities on ILEC premises. 47 U.S.C. § 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).

II. Federal Price Cap Regulation of Access Services

Historically, ILECs and other telecommunications carriers have been subject to rate-of-return regulation. *National Rural Telecomm. Ass'n.* 988 F.2d at 177-78. "Rate-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.'" *Id.* (citation omitted). In October 1990, the Commission broke that direct link between rates and costs when, for the largest LECs (including the Bell Operating Companies, or "BOCs"), it replaced rate-of-return of regulation with an incentive-based system employing price ceilings or "caps" on the aggregate prices the carriers charge for certain services in a given area. *WorldCom*, 238 F.3d at 453 (citing 47 C.F.R. § 61.41-.49). For the purposes of setting price caps, access services are grouped in various "baskets," including the CMT basket (for common line, marketing, and transport interconnection charge), the traffic-sensitive basket, trunking basket, and special access basket. *See generally WorldCom*, 238 F.3d at 453. The special access rates that are the subject of AT&T's requests pending at the agency and this mandamus petition fall within the special access basket.

The Commission decided to eliminate rate-of-return regulation for those large LECs 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 Telecomm. Ass'n*, 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 that characterize 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).

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)). The carriers that are 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 may go into effect. *WorldCom*, 238 F.3d at 454 (citing 47 U.S.C. §§ 203(a), 204(a)).

III. The *Pricing Flexibility Order*

In August 1999 – some four years after proposing pricing flexibility in a notice of proposed rulemaking, *Price Cap Performance Review of Local Exchange Carriers*, Second Further NPRM, 11 FCC Rcd 858 (1995) – the Commission issued the *Pricing Flexibility Order*.

This order "granted immediate pricing flexibility [to price cap LECS] for some services and set competition thresholds to trigger additional relaxation of regulatory controls." *WorldCom*, 238 F.3d at 454. The Commission also adopted a framework under which greater pricing flexibility could be granted in the future, in two phases (Phase I and II), and within individual Metropolitan Statistical Areas ("MSAs").[3] *Id*. at 455.

The pricing flexibility rules proceed in two phases. In Phase I, LECs are permitted 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. Phase I relief is available to LECs upon a showing of a certain amount of investment by competitors, evidenced by a certain percentage of collocation of competitors' equipment. Collocation refers to the placement of equipment of competitive local exchange carriers ("CLECs") on the premises of ILECs in order to give CLECs access to the ILECs' networks. *See generally* 47 U.S.C. § 251(c)(6). Phase II relief, which gives LECs "greater freedom to raise and lower rates outside of price cap regulation," 238 F.3d at 456, requires a showing that there has been a greater percentage of collocation.

To obtain pricing flexibility under Phase I or Phase II, a price cap LEC must file a petition demonstrating that certain competitive "triggers" have been met within a particular MSA. The triggers that must be satisfied vary depending upon the degree of pricing relief requested by the LEC and the services for which pricing flexibility is sought. The triggers "measure market competition based upon investments in infrastructure by potential competitors."

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[3] Each area within the United States is classified as either an MSA or an "RSA" (Rural Services Area). 47 C.F.R. 22.909. The additional flexibility contemplated in the *Pricing Flexibility Order* is available in MSAs. *See* 47 C.F.R. § 69.727(a).

WorldCom, 238 F.3d at 455. In particular, they indicate the extent to which competitors have collocated their facilities on ILEC premises 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. Price cap carriers that obtain Phase I relief must make their contract tariff rates available to all similarly situated customers, and must make discounts available to anyone willing to commit to the specified volumes or terms. *Pricing Flexibility Order*, 14 FCC Rcd at 14289, 14292 (paras. 124, 130). A LEC that obtains Phase I relief remains subject to FCC enforcement actions and to complaints pursuant to 47 U.S.C. § 208. *Id*. at 14290-91, 14292-93 (paras. 127, 131).

The *Pricing Flexibility Order* requires the LEC to demonstrate more collocation in the MSA as a prerequisite for Phase II relief. Once the Phase II triggers are satisfied, "LECs are given greater freedom to raise and lower rates outside of price cap regulation." *WorldCom*, 238 F.3d at 456. LECs given Phase II flexibility still "must file generally available tariffs and remain subject to FCC enforcement actions for anticompetitive behavior." *Id*.

The Phase I pricing triggers require a LEC to 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.'"[4] *WorldCom*, 238 F.3d at 455 (quoting *Pricing Flexibility Order*, 14 FCC Rcd at 14258 (para. 69)). The Phase II triggers require LECs to show "that competitors have established a significant market presence in the provision of the services at issue."[5] *Pricing Flexibility Order*, 14 FCC Rcd at 14258 (para. 69); *see also WorldCom*, 238 F.3d at 456.

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 concluded that "'the costs of delaying regulatory relief outweigh the potential costs of granting it before IXCs have a competitive alternative for 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 was not engaged in "an exact

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[4] "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).

[5] This Court detailed the specific showing a LEC must make in order to obtain Phase II relief: "[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." *WorldCom*, 238 F.3d at 456 (citations omitted). *See also* 47 C.F.R. §§ 69.709(c) and 69.711(c).

science." *Pricing Flexibility Order*, 14 FCC Rcd at 14276 (para. 96). "The thresholds," it stated, "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*. In order to obtain the benefit of a bright-line rule, the Commission declined to adopt triggers that could "provide more comprehensive measures of competition" but would "impose heavy burdens on both industry and the Commission." *Id*.

IV. The *WorldCom* Decision

A number of long distance telephone service providers – including petitioner AT&T Corp. – filed petitions for review of the *Pricing Flexibility Order*. Those petitioners asserted, among other things, that the Commission had 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 "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. Stating that price cap regulation "'involves policy determinations in which the agency is acknowledged to have expertise,'" the Court affirmed the Commission's decision to use "collocation as a proxy for competition in access service." *WorldCom*, 238 F.3d at 458. The Court acknowledged that collocation may be an inexact measure of market share, but the Court noted that the Commission "has long held that market share is not the be-all, end-all of competition." *Id*. The Court found that the Commission had examined a number of alternatives for measuring competition before adopting the collocation measure and had reasonably rejected the specific alternative put forward by the 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." 238 F.3d at 459. The Court was not troubled by the fact that the *Pricing Flexibility Order* "was dependent, at least in part, on the agency's predictive forecasts." *Id*. It pointed out that predictive judgments are a permissible 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).

The petitioners in *WorldCom* also claimed that the Commission's reliance on collocation as "a proxy for competition" was arbitrary and capricious because it would "grant incumbent LECs much of the relief afforded to carriers that are declared non-dominant . . . without engaging in the sort of competition analysis [the Commission] conduct[s] when considering to declare a carrier non-dominant" under the Commission's rules. 238 F.3d at 460. *See generally* 47 C.F.R §§ 61.18-26. The Court rejected this claim. It agreed with the Commission that the *Pricing Flexibility Order* does not grant ILECs all of the regulatory relief granted to non-dominant carriers; in particular, the Court pointed out that "[e]ven those CLECs which receive Phase II relief must still file tariffs," whereas non-dominant carriers are not required to do so. *Id*.

As to the specific collocation thresholds selected by the FCC, the Court determined that the Commission made a reasonable 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." 238 F.3d at 462 (citing *Pricing Flexibility Order*, 14 FCC Rcd at 14265-66, 14274-75 (paras. 81, 95)).

V. Developments Subsequent to *WorldCom*

The Commission granted BellSouth pricing flexibility in December 2000, before this Court decided *WorldCom*. After the 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 (JA 236). In each instance, 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 (JA 150-51).

On October 15, 2002, less than two years after the *WorldCom* decision, AT&T filed a petition for rulemaking asking the Commission to revise its special access rate regulations to "revoke pricing flexibility and [to] reinitialize price caps to levels designed to produce normal, rather than monopoly, returns." Petition for Rulemaking, *In the Matter of AT&T Corp*., RM No. 10593 (Oct. 15, 2002) ("AT&T Petition") at 6 (JA 8). In addition, AT&T requested interim relief of (1) a reduction of all special access rates that were subject to Phase II pricing flexibility to levels that would produce an 11.25 percent rate of return, and (2) a moratorium on consideration of further pricing flexibility applications pending completion of the rulemaking. *Id*.

AT&T's rulemaking petition prompted substantial supporting comments from other IXCs and opposing responses from ILECs challenging AT&T's factual assertions and proposals. More than a dozen parties have participated in the proceedings before the agency, and the record has more than 500 pages of comments.

SUMMARY OF THE ARGUMENT

The FCC is moving expeditiously to act on AT&T's request for a rulemaking. Accordingly, this Court may deny the mandamus petition without evaluating the "hexagonal" factors set out in *TRAC*, 750 F.2d at 80. In any event, the Commission has not delayed unreasonably, much less "egregiously," its consideration of the NPRM petition. *TRAC*, 750 F.2d at 72. AT&T's rulemaking request arrived at the Commission less than two years after this Court in *WorldCom* had upheld the *Pricing Flexibility Order*, has been pending at the agency for less than two years, and rests upon extremely complicated – and highly 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 not unreasonable.

The interim relief AT&T seeks is even less justified. The request for interim relief necessarily assumes that AT&T will prevail in its efforts to have the Commission rescind its pricing flexibility rules (even though this Court rejected a direct challenge to these rules in *WorldCom*). Moreover, the request goes far beyond seeking to maintain the status quo, or even to restore the status quo that existed prior to the implementation of pricing flexibility. Instead AT&T seeks to reinitialize price caps for special access at an 11.25 percent rate of return based on today's costs. This is a request for the prescription of interim rates pursuant to 47 U.S.C. § 205, and petitioners have not developed a record establishing that every special access rate in every MSA in which Phase II pricing flexibility has been granted violates the just-and-reasonable standard of 47 U.S.C. § 201. And insofar as AT&T claims that the ILECs are charging excessive rates in violation of 47 U.S.C. § 201(b), it has 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).

ARGUMENT

AT&T's claims do not present a proper occasion for granting the extraordinary remedy of mandamus.

A. The Standard For Obtaining Mandamus

"Mandamus 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 (1976) (mandamus is a drastic remedy appropriate only in "extraordinary situations"). 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); *see also Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) ("'absent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable of a rulemaking proceeding is entitled to considerable deference'") (citation omitted).

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); s*ee also In re United Mine Workers of America International Union*, 190 F.3d 545, 549 (D.C. Cir. 1999) ("In exercising our equitable powers under the All Writs Act, we are guided by the factors outlined in" *TRAC* "for assessing claims of agency delay.").[6]

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

The Commission has not refused to act on AT&T's requests. After reviewing and analyzing the extensive submissions discussed above, the Commission's Wireline Competition Bureau has drafted a decision memorandum for the Office of the Chairman on this matter. The Commission now is in a position to act on AT&T's requests in the near future. Because the agency is "moving expeditiously" to act on petitioners' requests, this Court may deny the mandamus petition without evaluating the "hexagonal" factors set out in *TRAC*. *See* 750 F.2d at 80. In any event, 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 two years, and rests upon extremely complicated – and highly 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 the *TRAC* factors confirms this conclusion.

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6 Petitioners claim that the Commission has "unlawfully withheld" "agency action," see 5 U.S.C. § 706(1), by not yet responding to AT&T's rulemaking petition. Pet. Br. at 30. Because Congress has not established a statutory deadline for agency action, the only question is whether the Commission has egregiously delayed acting on the rulemaking request. *See*, *e.g.*, *Forest Guardians v. Babbitt*, 164 F.3d 1261, 1272 (10th Cir. 1998) ("the distinction between agency action 'unlawfully withheld' and 'unreasonably delayed' turns on whether Congress imposed a date-certain deadline on agency action"); *see also Sierra Club v. Thomas*, 828 F.2d at 794-95 & nn. 77-80 (distinguishing between agency's refusal to comply with an absolute time requirement for action and agency's more generalized unreasonable delay in acting).

First, the issues raised by AT&T in its rulemaking request are complicated and controverted. In its 41-page rulemaking petition (accompanied by 70 pages of supporting materials), AT&T asserted that: (1) the ILECs' special access rates were grossly excessive and unlawful, and becoming more so;[7] (2) the ILECs' assertedly "excessive" special access rates were having substantial anticompetitive effects;[8] (3) IXCs and CLECs had no alternative but to purchase special access service from the ILECs;[9] and (4) the Commission has a duty under 47 U.S.C. §§ 201 and 202 to ensure that special access rates are just and reasonable.[10]

The ILECs responded that their special access rates were not excessive and therefore not unlawful, and they challenged the evidence put forward by AT&T in a number of ways. First, noting that "BOCs only began to take advantage of pricing flexibility in 2001," SBC asserted that "AT&T's 'evidence' regarding BOC special access revenues and earnings since adoption of the pricing flexibility framework" – being a snapshot of at most one year of data – "says[s] nothing about the impact of pricing flexibility." Opposition of SBC, *In the Matter of AT&T*

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7 *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) (JA 12); *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 customers – and, indeed greatly *increasing* sales – in the wake of those price increases.") (emphasis in original) (JA 13). Accordingly, AT&T claimed that "[e]xperience 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 the incumbent LEC[s]' was erroneous." *Id*. at 20. (JA 22).

8 Specifically, AT&T claimed 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 (JA 20-25), and that the ILECs' excessive special access rates had an anticompetitive impact on the long distance market, *see id*. at 23-24 (JA 25-26).

9 AT&T Petition at 25-33 (JA 27-35).

10 AT&T Petition at 33-41 (JA 35-43).

Corp. Petition for Rulemaking, RM No. 10593 (Dec. 2, 2002) ("SBC Opp.") at 16 (JA 233).[11] Second, the ILECs urged the Commission to reject AT&T's assertions regarding excessive rates because AT&T relied on data from ARMIS reports that ILECs filed with the FCC, and that the ILECs contend are not used for evaluating the reasonableness of rates.[12] *See also Pricing Flexibility Order*, 14 FCC Rcd at 14303-07 (paras. 160-68) (noting potential difficulties with accurately calculating interstate earnings following grant of pricing flexibility). Third, citing the analysis of economists as well as the comments of an independent competitive access provider (Time Warner Telecom), the ILECs asserted that collocation-based triggers do in fact serve as an accurate proxy for predicting competition, *see* Verizon Opp. at 9-10, 13 (JA 274-75, 278), and more generally, there is evidence of extensive competition in the special access market.[13] Fourth, the ILECs argued that, given the competition in the special access market, they could not

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[11] *See also* SBC 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") (JA 236).

[12] *See* Opposition of Verizon, *In the Matter of AT&T Petition for Rulemaking*, RM No. 10593 (Dec. 2, 2002) ("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'") (JA 286) (quoting *Policy and Rules Concerning Rates for Dominant Carriers*, Order on Reconsideration, 6 FCC Rcd 2637, 2728, 2730 (paras. 194, 198, 1999); *see also* 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") (JA 239).

[13] SBC specifically asserted that (1) "[t]he number of carriers reporting to the Commission that they provide competitive access services has grown to 532" and "these competitors now account for between 28 and 39 percent of all special access revenues," SBC Opp. at 10-11 (JA 227-28); (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 (JA 228-29); and (3) CLECs have raised capital to build out their networks and deploy fiber, *id*. at 13 (JA 230).

and do not engage in anti-competitive behavior. SBC Opp. at 25-37 (JA 242-54); *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.") (JA 245).[14]

The lengthy submissions by AT&T and the ILECs have generated an active docket. For example, AT&T asserted in its rulemaking petition that "neither market forces nor the Commission's existing special access rate regulation" could correct the BOCs' excessive special access rates. AT&T Petition at 25 (JA 27). AT&T specifically claimed that competitive carriers "can self-supply or use third-party facilities-based special access" only in limited circumstances, *see id*.; as supporting evidence, AT&T cited findings of the New York Public Service Commission that, with respect to the provision of special access services in Manhattan, "Verizon's network serves 7354 buildings . . . over fiber while CLECs serve fewer than 1000 buildings." AT&T Petition at 28 (JA 30). AT&T also claimed that "self-deployment of alternative facilities to provide special access is infeasible in most cases" for CLECs because they lack the economies of scale available to the BOCs, and because they are unable to afford the sunk costs necessary to build their own loop and transport facilities. *See id*. at 28-30 (JA 30-32).

The ILECs strenuously disagreed with AT&T's assessment of competition in the special access market. *See* Verizon Opp. at 11-20 (JA 276-85). To establish that the "special access market is vibrantly competitive," *see id*. at 11 (JA 276), Verizon noted that (1) "As of year-end

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[14] 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' 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 (JA 245).

2001, competitors had captured roughly 36 percent of special access revenues, up from 33 percent when the *Pricing Flexibility Order* was adopted," *id*. at 12 (JA 277); (2) "Investment in competing facilities … has continued to grow markedly notwithstanding both the extensive grants of pricing flexibility and the industry's travails," as evidenced by the fact that "[t]here are now nearly 1800 fiber networks in the top 150 MSAs, compared to 1100 in 1999," *see id*.; (3) "Competitive fiber miles, collocations, and buildings served by CLEC fiber have increased dramatically," as demonstrated by the fact that "CLECs have deployed almost 184,000 route miles of fiber," *id*. at 13 (JA 278); (4) in particular, AT&T has continued to expand its access networks, *id*. at 14 (JA 279); and (5) "AT&T and other carriers are extensively using their own and competitors' special access services and facilities instead of the ILECs' offerings," *id*. at 16-17 (JA 281).

This summary of just some of the contentions made by the parties before the Commission offers a sense of the complexity of the issues raised by AT&T's rulemaking petition, as well as the extent of the controversy between the parties.[15] Because AT&T's petition has been pending for less than two years, raises complicated questions, and has generated an extensive record, it is not unreasonable that the FCC has not *yet* ruled on the rulemaking request. *See*, *e.g.*, *TRAC*, 750 F.2d at 81 (delays of two and five years did not warrant mandamus); *see also Oil, Chemical and*

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[15] In its opening brief, AT&T does not dispute that the questions raised by its rulemaking request raise difficult and contested issues of fact and law. Pet. Br. at 34. Instead, AT&T accuses the Commission of attempting to avoid making a decision on the rulemaking petition. As noted earlier, the Commission is taking steps to act on the petition, and it is reasonable for the Commission to take the time necessary to prepare a response to a rulemaking petition raising such complicated questions. *Cf. Sierra Club v. Thomas*, 828 F.2d at 799 ("Given the complexity of the issues facing EPA and the highly controversial nature of the proposal, agency deliberation for less than three years – little more than one year since the close of the public comment period – can hardly be considered unreasonable.").

Atomic Workers, 768 F.2d at 1487-88 (dismissing mandamus petition for agency failure to complete rulemaking upon showing by agency, after five year-delay, that it would complete rulemaking within two years).[16]

Second, Congress has not "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. In contrast, certain provisions of the 1996 Act explicitly set deadlines for action by the Commission on regulatory matters. *See*, *e.g.*, 47 U.S.C § 271(d)(3) (setting 90-day deadline for Commission to issue written determination approving or denying applications by BOCs to offer interLATA services); 47 U.S.C. § 160(c) (petition for forbearance "deemed granted" if the Commission "does not deny the petition for failure to meet the requirements . . . under subsection (a) within one year after the Commission receives it, unless the period is extended by the Commission"); *see also, e.g.,* 47 U.S.C. § 208(b)(1) (requiring Commission to conclude "investigation" under section 208 "of the lawfulness of a charge, classification, regulation, or practice" and issue order "within 5 months after the date on which [] complaint was filed"); 47

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16 The Court's recent decision in *In re: American Rivers and Idaho Rivers United*, 372 F.3d 413 (D.C. Cir. June 22, 2004) ("*American Rivers*"), does not establish a new general standard for agency action that the FCC has failed to satisfy. The Court in that case granted a petition for mandamus where the Federal Energy Regulatory Commission had failed to respond "for more than six years" to a petition seeking agency consideration of the effects of a hydroelectric power project on endangered salmon in the Snake River basin. *American Rivers*, 372 F.3d at 414, 418. FERC contended that it was "not obligated to address the . . . petition at all," whereas the Court found that FERC *was* obligated to respond. *Id.* at 418-19. The Court also pointed out that the statute under which FERC's action was sought "was designed to 'halt and reverse the trend toward species extinction,'" and that FERC had not identified any "'agency activities of a higher or competing priority' that might have required its attention." *Id.* at 420. (citation omitted). The Court cited earlier cases finding "unreasonable delay" where agencies had failed to act within six, five, four, and three years, and reaffirmed that "there is no *per se* rule as to how long is too long." *Id.* at 419. Finally, *American Rivers* confirms that the *TRAC* standards continue to govern the disposition of agency mandamus petitions. *Id.* at 418.

U.S.C. § 251(d)(1) (setting six-month deadline for FCC to "complete all actions necessary to establish regulations to implement the requirements of" section 251); 47 U.S.C. § 254(a)(2) (requiring Commission to complete universal service proceeding within 15 months). Congress' establishment of statutory deadlines in some parts of the 1996 Act, but not in its provisions governing the Commission's pricing flexibility authority, "is a factor counseling against judicial intervention" with respect to petitioners' claim of agency delay. *Sierra Club v. Thomas*, 828 F.2d at 797 n.99.

Third, AT&T's complaint of delay concerns a matter of economic regulation, and "human health and welfare" are not at stake. That fact further undermines AT&T's argument for mandamus. *See Cutler v. Hayes*, 919 F.2d at 898 (delay that is "less tolerable when human lives are at stake" may "be altogether reasonable in the sphere of economic regulation."); *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) (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 of the Commission not to proceed with rulemaking").

Finally, AT&T's rulemaking request has been pending during a time when the agency has dealt with a number of pressing responsibilities. Over the past several years, the Wireline Competition Bureau and the Commission have had to resolve 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. And the bureau and the Commission had to deal with an ongoing obligation to review all of the agency's telecommunications rules every two years and to repeal or modify those rules found to be no longer necessary in the public interest as a result of competition. *See* 47 U.S.C. § 161; *see also Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004) (affirming recent FCC biennial review order). In addition, during the same time that parties were filing comments in response to AT&T's rulemaking request, the Commission has had to resolve, on remand, 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 16978 (2003) (revision of rules governing the unbundling obligations of incumbent local exchange carriers under 47 U.S.C. § 251(c)(3)), *vacated in part*, *United States Telecom Association v. FCC,* 359 F.3d 554 (D.C. Cir. 2004), *pets. for cert. pending*; *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003) (modification of media ownership rules), *aff'd in part, remanded in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. June 24, 2004). During 2003, the Commission also 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.[17] The Commission's decision to act on those matters "of a higher or competing priority," *American Rivers*, 372 F.3d at 420, and to allow the record to develop on the effect of its special access pricing rules was reasonable.

C. AT&T Has Not Established That The Commission Has Unduly Delayed Acting On Its Request For Interim Relief Or That It Is Entitled To Interim Relief

In its October 2002 petition, AT&T asked the agency to grant its request for interim relief by immediately reducing "all special access charges for services currently subject to Phase II

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[17] Report and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC 14014 (2003), *see also Mainstream Marketing v. FCC*, 358 F.3d 1228 (10th Cir. 2004). With respect to number portability, *see* 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.

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. Br. at 21; *see also id*. at 27 ("[T]he agency should re-impose price caps during the pendency of any rulemaking proceeding."). Before this Court, AT&T seeks an order requiring the Commission to grant its request for interim relief. *Id*. at 40.

The relief sought before the Commission is really a request for the prescription of interim rates pursuant to 47 U.S.C. § 205.[18] Even if the current record before the Commission were not controverted as to the reasonableness of the ILECs' special access rates – and it is – that record still would not be sufficient to justify a prescription of rates. *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) (prescription "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 prescription 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

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[18] 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 Chapter, 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 the 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." 47 U.S.C. § 205(a).

violates section 201. The FCC may prescribe rates only after it has found the existing rate to be unlawful, 47 U.S.C. § 205(a), yet AT&T has not attempted to make a showing of unlawfulness for each individual rate put at issue in its rulemaking petition.

AT&T's interim relief request also presumes the correctness of AT&T's position on the rulemaking, and goes far beyond seeking to restore the status quo that existed before the implementation of pricing flexibility. AT&T plainly is not entitled to interim relief where the result it seeks – 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 whose retention the Commission had failed to justify). As demonstrated above, however, the FCC's ultimate disposition of the rulemaking petition is uncertain given the controverted and complicated record before the Commission.

Finally, AT&T and other purchasers of special access have available an adequate legal remedy – the section 208 complaint, *see* 47 U.S.C. § 208[19] – for challenging rates they claim are unjust and unreasonable. *See, e.g., Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (rejecting customer's complaint that commercial mobile radio service provider's sales concession practice

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[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. . . . (4) 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. . . ." 47 U.S.C. § 208(a).

was unreasonable under 47 U.S.C. § 202); *cf. Interstate Natural Gas Association of America v. FERC*, 285 F.3d 18, 58 (D.C. Cir. 2002) ("the availability of individual ratemakings as a venue, though markedly inferior, is nonetheless a kind of safety valve" justifying denial of mandamus petition for agency delay on rulemaking request). The Commission emphasized the availability of complaints 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). The availability of individual section 208 complaints to challenge rates claimed to be unjust and unreasonable undermines AT&T's claim for interim relief on mandamus.

CONCLUSION

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

Respectfully submitted,

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July 1, 2004

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

IN RE AT&T CORP., THE COMPTEL/ASCENT ALLIANCE, eCOMMERCE AND TELECOMMUNICATIONS USERS GROUP, AND THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, PETITIONERS	)	NO. 03-1397

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Federal Communications Commission" in the captioned case contains 8206 words.

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August 20, 2004