Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
Business Data Services in an Internet Protocol Environment
Technology Transitions
Special Access for Price Cap Local Exchange Carriers
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services

WC Docket No. 16-143
GN Docket No. 13-5
WC Docket No. 05-25
RM-10593

DECLARATION OF [DECLARANT]

I, Susan M. Gately, hereby declare:

1. My name is Susan M. Gately. I am over the age of 21, and I am competent to make this declaration. I make this declaration in support of the Motion for Stay Pending Judicial Review of the Federal Communications Commission’s Business Data Services Report and Order (“BDS R&O”) filed by the Ad Hoc Telecom Users Committee (“Ad Hoc”). The matters cited in this declaration are based on my personal knowledge, information, and belief, and if called to testify, I could and would testify to the same effect.

2. I am President of SMGately Consulting, LLC (“SMGC”), 84 Littles Avenue, Pembroke, MA 02359. SMGC is a consulting firm specializing in telecommunications, economics, and public policy. I am an economic and policy expert specializing in the telecom arena with more than thirty years of consulting experience.
My specific experience lies in the areas of telecom industry structure; telecom services and network management practices; regulatory regimes; cost development; pricing and rate structure; and access charges.

3. Prior to founding SMGC, I was a partner in and the Senior Vice President at Economics and Technology, Inc. (“ETI”), providing advice, litigation support, expert testimony, white papers, and in-house training and education to ETI’s myriad carrier, governmental agency, and large business clients. I have provided expert testimony on a variety of telecom policy matters and participated in hundreds of FCC proceedings since 1981 on access charges, universal service, separations and cost accounting, and forms of regulation. I have appeared as an expert witness in state proceedings before state public utility commissions.

4. I have been involved in the analysis of incumbent LEC intrastate and interstate access tariffs since the inception of those tariffs in 1984. I have participated in virtually every major FCC proceeding on access charges and price caps. I am among the nation’s leading experts on access charge rate structure, methodology, and policy. Access issues I have addressed in hundreds of submissions to the FCC include access service pricing and rate structures, price caps implementation, access service costs (including cost allocation of regulated and non-regulated services), and alternative forms of regulation. I undertook a detailed analysis of the data filed in response to the FCC’s first “voluntary data request” in its special access or “BDS” proceeding in Docket 05-25 in 2013 and most recently of the data filed in response to the “mandatory data request” that followed in the above named proceedings.
5. I have served as an economic advisor to and subject matter expert for the Ad Hoc Telecom Users Committee since the early 1980s. In that capacity, I have reviewed and analyzed information regarding pricing, network architecture, contractual terms and conditions, applications, cost allocations, and cost recovery by telecommunications service providers on behalf of hundreds of business customers, including the members of the Ad Hoc Telecom Users Committee. On behalf of those business customers, I have also analyzed their internal network architectures, costs of service, and cost recovery. As a result, I am familiar with the services that business customers purchase and how they are used in furtherance of the customers’ business plans.

6. “Business Data Services” (“BDS”) is the FCC’s latest terminology for a group of telecommunications services that are, and for decades have been, the fundamental building blocks of corporate networks. Formerly known as “special access,” BDS services include all of the “private lines” or “point-to-point connections” that business customers use for their internal corporate networks, for their external communications with their customers, and to deliver their products to their customers. Virtually every critical business activity – withdrawals from a bank’s ATM, credit card “swipes” at merchants’ point-of-sale terminals, toll-free calls to customer service centers, data collected by regional offices, damage assessments recorded by insurance agents, inventory reports by car dealerships or retailers, voice and video conference calls among employees – all of these critical business activities can only be done via BDS facilities. For all types of businesses in all types of industries, BDS facilities are
the long-standing and essential ingredients of the networks used to communicate internally and deliver services to customers.

7. Business rely on a broad range of services. The largest companies in the country still depend upon some of the smallest capacity services offered by the incumbent local exchange carriers (“ILECs”). In particular, business users still rely heavily on DS1 connections for service to low-volume locations. I have, for example, advised an insurance company that uses at its headquarters campus an OC-192, which is a fiber-based facility with enough capacity to handle the equivalent of about 130,000 voice lines. But it also buys about 18,000 DS1 circuits to connect to the offices of its agents around the country. Similarly, credit card issuers purchase very high capacity BDS for their data centers but depend upon the lowest capacity data circuits for the millions of merchant point-of-sale terminals at which their cardholders “swipe” their cards. Thus, the FCC’s decision to eliminate rate protections for customers of DS1/DS3 BDS, in the apparent belief that those services no longer play a critical role for business customers, is simply misguided and misinformed.

8. The Commission has already allowed customers to be exploited for too long by unjust and unreasonable rates while this rulemaking has been pending. In January, 2002, Ad Hoc was the first party to sound the alarm when ILECs began taking advantage of the Commission’s flawed pricing flexibility rules by raising their rates for “special access,” as business data services were then known.1 Nine months later, AT&T filed its petition “essentially requesting that the Commission revoke the pricing

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1 Comments of the Ad Hoc Telecommunications Users Committee on the NPRM, CC Docket No. 01-321 (filed January 22, 2002) at 3-6.
flexibility rules and revisit the CALLS plan which had set the rates that price cap ILECs charged for BDS. Three years and a mandamus petition later, the Commission finally opened this rulemaking. Now, after more than a decade – and 15 years after Ad Hoc first flagged the issue – the Commission has finally adopted regulatory reform for BDS. But its latest order does nothing to protect business customers from unjust and unreasonable rates.

9. The Commission’s failure to regulate BDS prices in non-competitive areas has allowed price caps ILECs to exploit customers with rates that have been excessive for years. The magnitude of the resulting overcharges that purchasers of BDS have been paying is quantifiable and patently unreasonable. In an August 2004 analysis filed by Ad Hoc in this docket, I estimated that special access prices were set at levels that were generating about $15 million per day beyond what would have been expected in a competitive market. In comments filed by Ad Hoc in July 2016, I pointed out that this amount added up to more than $64 billion in overcharges imposed on BDS customers.

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3 AT&T Corp., et al., D.C. Circuit Case No. 03-1397, Petition for a Writ of Mandamus (filed Nov. 6, 2003).


5 See Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, RM-10593 (filed July 13, 2016) at 8. This figure is a conservative estimate since it assumed that the level of overcharges had remained constant over time since 2003. In fact, the per day overcharge grew since that time as a result of increased price levels, increased volumes of sales, and efficiency enhancements that were not captured because of the Commission’s failure to reset the price caps X-factor when the CALLS plan expired. In addition, the figure of $15-million per day was calculated using ILEC year-end 2003 results. Ad Hoc updated the amount to $17.5-million per day using 2004 year-end data and to $21-
10. In short, both the direct experience of business customers and the evidentiary record before the FCC in this docket demonstrate that BDS prices will go up absent a stay. As Ad Hoc has repeatedly reported to the FCC and as the evidence in the record confirmed, the ILECs have consistently responded to BDS de-regulation by raising their prices. As the Commission’s own tariffs document, ILECs raised prices in “pricing flexibility” areas above the levels the FCC’s price caps rules identify as just and reasonable.\(^6\)

11. The FCC’s statutory responsibility under the Communications Act is to protect customers from unjust and unreasonable rates. The Commission itself has declared that its job is to preserve “the principles embodied in the Communications Act that have long defined the relationship between those who build and operate networks and those who use them.”\(^7\) One of these principles, one of the Act’s “core statutory values as codified by Congress,” which the Commission has declared it must preserve as it facilitates and encourages market-driven technological transitions in network technology, is consumer protection.\(^8\) In order to vindicate that core statutory value, the Commission must protect customers from the ILECs’ market power in the business data services (“BDS”) market, pending the emergence of competition in the BDS market.

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\(^6\) See, e.g., Comments of the Ad Hoc Telecommunications Users Committee on the NPRM, WC Docket No. 05-25, RM-10593 (filed June 13, 2005) at 18-24.


\(^8\) Id. at 1435, para. 1.
Until that occurs, the Commission can and must protect customers from unjust and unreasonable rates, which the BDS order does not do.

12. In light of past experience with BDS pricing by ILECs and the dependence of businesses on those BDS services, either as ILEC customers or customers of competitive carriers that rely on ILEC BDS inputs, the effect of this Order will be to diminish competition to the detriment of business customers by hampering the ability of competitive carriers to compete. Based on my experience, diminished competition, including the withdrawal of competitive carriers from market segments, will lead to business customers paying higher prices and suffering the other harms that come from a lack of robust competitive choices, such as a decrease in the quality of services and less innovation in the creation of new services.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Pembroke, Massachusetts on the 23rd day of June, 2017.

Susan M. Gately