pricing flexibility or other regulatory relief within the price caps system – *i.e.*, whether and to what extent competition exists in the product and geographic markets for which relief is sought. The Commission has proposed that the regulatory relief and pricing flexibility described in Section C below be adopted without regard to current competitive conditions. FNPRM at ¶34. TRA strongly believes that this would be a mistake. TRA also disagrees with the Commission's alternative proposal that, if it determines that regulatory relief and pricing flexibility should be conditioned on a showing of competitive conditions, then a demonstration that barriers to competition have been removed will be sufficient. Id.

As TRA emphasized above, the Commission should not confuse potential competition with actual competition that is viable enough to discipline market power, or equate contestable markets with contested markets, assuming that the presence of any alternative service vehicle translates into meaningful competition. An LEC should not be accorded any form of regulatory relief or pricing flexibility discussed in the FNPRM unless it first makes a compelling showing that a meaningful level of competition exists in the relevant product and geographic markets for which relief is sought. It should not be sufficient for an LEC to establish only that barriers to competitive entry have been removed.

The Commission has proposed that LECs be required to demonstrate two different levels of competition – one level to obtain relaxed regulatory treatment and another to qualify for streamlined regulation. FNPRM at § 106. In the former case, the Commission has proposed to require LECs to prove only potential competition, such as the elimination of at least some barriers to competitive entry. In the latter case, the Commission proposes that the LECs demonstrate "substantial competition." Id. This more stringent test is discussed in Section D below.

As the Commission has recognized, the first step in demonstrating the presence of potential or actual competition is to define the relevant geographic and product markets.

1. **Relevant Markets**

a. **Product Market**

With respect to the definition of the relevant product market for purposes of assessing the level of competition, TRA supports the Commission's proposal to define such markets by reference to the existing price caps service baskets and the service categories and subcategories within the service baskets. FNPRM at § 118. This would mean that LECs' interstate services would be divided into the following product markets:

a. common line services
b. traffic sensitive services
    i. local switching
    ii. information
    iii. data base access
    iv. billing name and address
c. trunking
    i. voice grade flat-rate transport, voice grade special access, WATS, metallic, and telegraph;
    ii. audio and video
    iii. high capacity and digital data services (DDS);
        A. DS1 special access and DS1 flat-rate transport;
        B. DS3 special access and DS3 flat-rate transport.
    iv. wide band data and wide band analog;
    v. tandem-switch transport;
    vi. interconnection charge;
    vii. signalling for tandem switching; and
d. interexchange services

FNPRM at ¶ 118.

These same service categories could be used for purposes of assessing competitive conditions in response to an LEC's request for streamlined regulation of one or more services. TRA agrees with the Commission's view, that it is likely that competition will develop at

different rates with respect to different services, and that, administrative burdens aside, the public interest would be best served by evaluating competition on a more disaggregated level than to evaluate it within broad categories of services.

b. Geographic Market

Similarly, TRA expects that competition will develop at different rates in different geographic areas, and that the most accurate measure of competition will be obtained by defining geographic markets by reference to small, rather than large, areas. Thus, defining the relevant geographic market by reference to density-based pricing zones identified by the LECs would result in geographic areas that are too large. Because there are now only up to three zones per study area, there may be variations of competitive levels within each zone. FNPRM at ¶¶ 120-123. Moreover, such an approach might not accurately reflect competition in services other than trunking because the designation of zones is based on traffic densities and cost characteristics for the trunking basket, id. at ¶ 124, which may differ for other services. On the other hand, a benefit of the density-based pricing zone approach is that it would be a relatively simple approach to administer. This benefit is not sufficient to offset the inaccuracies of the data that might result from this approach, however.

Similarly, local access transport areas ("LATAs") would be too large to serve well as a market designator. Wire centers are relatively small, and thus may prove to be administratively problematic for the industry and the Commission in certain instances. Wire centers would nonetheless provide a highly precise geographic area for measuring competition. As a practical matter, LECs would undoubtedly combine adjacent wire centers in making requisite competitive showings and so long as a comparable level of competition was present

in each of the combined markets, such aggregation would be appropriate. Such combinations would lessen administrative burdens without a loss of precision. Moreover, defining markets as combinations of wire centers would provide LECs with the flexibility to more accurately encompass within service areas the specific areas in which competition has emerged. Accordingly, TRA submits that the public interest would be best served by designating wire centers as the base geographic market for measuring competition.

2. Measure of Competition for Regulatory Relief -- Removal of Barriers to Local Competition

TRA fundamentally disagrees with the Commission's proposal, FNPRM at § 106, that an LEC should be required to demonstrate only that barriers to competitive entry have been removed to qualify for regulatory relief and pricing flexibility within the price caps system. TRA does support, however, the proposals that demonstration of competitive circumstances should be related to the type of regulatory relief sought, FNPRM at § 106; and that, if regulatory relief is granted, some level of regulation should be left intact to prevent predatory pricing, cross-subsidization, or other anticompetitive or discriminatory behavior, id.

TRA offers for the Commission's consideration the following "competitive checklist":

1. Authorization of competing providers of local switched telephone service;
2. Unbundling of fundamental network elements, including local loops (distribution, concentration, feeding), switching (end office, tandem, packet), signalling, transport (dedicated, common) and operator services;
3. Availability of expanded interconnection (physical or virtual collocation);
4. Availability of service provider number portability;

5. Availability of compensation arrangements by which the LEC and its competitors may complete telephone calls originated on one another's networks;

6. Access by competitors to directory assistance, 911, and other databases;

7. Implementation of IntraLATA toll dialing parity;

8. Availability of meaningful opportunities to resell local exchange and exchange access service;

9. Availability of nondiscriminatory arrangements for sharing pole attachments and conduit space; and

10. Fair and equal access to numbering resources.

In TRA's view, all of the items listed above represent significant barriers to entry and unless each has been eliminated, meaningful local exchange/exchange access competition will not emerge. Thus, TRA submits that at a minimum, LECs should have to demonstrate that each of these barriers has been eliminated prior to any relaxation of regulatory oversight. As noted above, however, TRA further urges the Commission to require as a precondition to such relaxation of regulatory oversight a showing that actual competition exists in the pertinent geographic and product market and that the competitor or competitors serving those markets actually provide service to a threshold percentage of the user population. In other words, an LEC would have to show that the market was contested to some degree, not merely contestable.

TRA proposes that an LEC seeking relief demonstrate that at least one viable competitor be operating in the pertinent geographic and product market -- a standard higher than that proposed by the Commission, but lower than the "substantial competition" standard the Commission has proposed for obtaining streamlined regulation -- because of the stated purpose of regulatory relief: to provide LECs with greater flexibility to respond to

competition. Even if all barriers to entry have been eliminated, if no actual viable competition exists, the obvious question is: "What competition do the LECs need flexibility to respond to?" And don't incumbent LECs already have a host of competitive advantages at their disposal *vis-a-vis* new market entrants? Thus, it is entirely reasonable to demand that some measurable level of competition exists before an LEC is unleashed to compete. Unless some measurable level of actual competition exists, affording LECs additional pricing flexibility will serve only to arm them against prospective competition, creating the risk that they will use that new-found flexibility to inhibit nascent competition.

In the interexchange services market, regulatory constraints imposed on the dominant provider allowed competition to take root and flourish. AT&T was not afforded significant regulatory relief until it was confronted with hundreds of competitors, several of which were of significant size and possessed of sizeable market share by the time the relief was forthcoming. TRA urges the Commission to follow the same reasoned approach here, relaxing regulation of LECs only when market forces compel such relaxation.

Negative factors should also be considered as offsets to the pro-competitive indicia listed above. Such factors might include lack of responsiveness by the LEC to competitors' requests for interconnection, discriminatory treatment of or among competitors, recent or persistent history of predatory pricing, cross-subsidization, or attempts to evade the Commission's rules or Communications Act requirements, and other indicia of resistance by the LEC to competition or disregard for Commission rules or statutory requirements. Sanctions for such conduct could include reinstitution of strict regulatory oversight.

3. Procedural Markets

As to the issue of how LECs should be required to demonstrate that competitive conditions satisfy the criteria adopted by the Commission, TRA concurs with the Commission's tentative conclusion that the tariff process is too cumbersome, subject to manipulation, and not designed for such purposes. FNPRM at ¶ 115. TRA further opposes the alternative process proposed in the FNPRM by which a carrier which had certified that it had met the criteria on the competitive checklist, would automatically be granted regulatory relief unless the Commission acted within a fixed period of time to deny that relief. Id. at ¶ 113. Such a process would not be adequate to protect the public interest, given the potential for a grant without full scrutiny.

A process akin to that used to obtain waivers of the Commissions rules would appear to strike an appropriate balance between minimization of administrative burden and protection of the public interest. Under such a scheme, a carrier would file a petition for waiver demonstrating with specificity that the required competitive conditions existed and that the public interest would be served by grant of the requested relief. A meaningful opportunity for public comment should, of course, be made available.

C. Proposals for Regulatory Relief

The Commission has proposed a variety of measures to provide the LECs additional pricing flexibility within the price cap regulatory regime largely to enable the LECs to respond promptly to competition. Most significantly, the Commission has proposed that the lower band limits be removed from the price cap scheme to permit the LECs to lower their rates as much as they wish without advance notice and with a presumption of lawfulness. FNPRM

at ¶ 75. The Commission has proposed that relaxed regulation be made available to all LECs without regard to competitive conditions. Id. at ¶ 36. TRA believes that this would be a serious mistake and would disserve the public interest. If any of the relaxed regulatory measures is adopted, the LECs should not be permitted, as is proposed, to exploit the enhanced pricing flexibility and regulatory relief "at their discretion." Id. at ¶ 104. Instead, they should first be required to demonstrate meaningful competition for the service for which they seek to avail themselves of regulatory relief or pricing flexibility.

As noted above, it would be premature to grant LECs the flexibility to respond to competition until a cognizable level of competition is present, which is not the case today. TRA supports measures that would encourage LECs to lower their rates and move prices closer to costs, as long as such measures do not facilitate predatory pricing or other anticompetitive behavior that would harm competition in the long run.

When the price cap system of regulation was initially adopted, the system gave the LECs less pricing flexibility than AT&T "because LEC services were less competitive than interexchange services."[27] FNPRM at ¶ 77. The LECs' ability to raise or lower rates on short notice and with a presumption of lawfulness was limited to plus or minus 5 percent because the Commission was concerned that "LECs would set prices in an anticompetitive manner."[28]

Nonetheless, the LECs already enjoy substantial pricing flexibility within the existing price cap system. No upper and lower pricing bands have been set for service

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[27] Policy and Rules Concerning Rates for Dominant Carriers, (Report and Order and Second Further Notice of Proposed Rulemaking), 4 FCC Rcd. 2873 (1989) ("AT&T Price Cap Order") at 3239, ¶ 758.

[28] AT&T Price Cap Order, 4 FCC Rcd. at 3239, ¶ 758.

categories in the interexchange and common line baskets, and the upper and lower pricing bands -- within which the LECs may change their rates on short notice and with a presumption of lawfulness -- for service categories within the traffic sensitive and special access (now trunking) baskets have been adjusted on several occasions. FNPRM at ¶¶ 78-80. The LECs were given additional pricing flexibility when the Commission adopted zone density pricing for switched transport services and the pricing band within each zone was expanded to permit the LECs to adjust their rates annually by as much as 5 percent up and 10 percent down relative to the Price Cap Index ("PCI") for the traffic sensitive service basket without advance notice or filing of cost justification. Id. at ¶ 79.

1. Elimination of Lower Band Limits

In the First Report and Order in this proceeding,[29] the Commission expanded the lower band limits for most service categories within the traffic sensitive and trunking baskets from 5% to 10%, and increased the lower band limits for density pricing zones from 10% to 15%. FNPRM at ¶ 81. The Commission now proposes to eliminate the lower pricing bands for all service categories within the traffic sensitive and trunking baskets. The Commission cites as its objective in so doing the discouragement of inefficient entry by competitors, which it notes may result if the LECs are not permitted to price their services near cost, since competitors could enter the market charging rates set just below those of the LECs, but not as low as they could be. Id. at ¶ 83.

While TRA supports efforts to move rates toward costs, it questions the proposition that LECs will not be able to use their new-found pricing flexibility to drive competitors from

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[29] Price Cap Performance Review for Local Exchange Carriers, 10 FCC Rcd. 8962 (1995) at ¶ 411.

the market. Given their incumbent position and massive capital resources, LECs would easily be able to outlast any newcomer to the market in a predatory price war. Responding to these concerns, the Commission opines that the 5 percent upper band limit on rate increases would limit the LECs' ability to reduce rates to predatory levels, and then, once competition is driven from the market, to increase rates more than 5 percent without filing cost support information. FNPRM at ¶ 83. While this limitation might slow predatory activity, a lower upper band limit, such as a one percent limit, which the Commission proposes, id. at ¶ 105, would be a critical element of this scheme. Of course, if circumstances warranted, the LECs could always increase their rates above the one percent limit by filing cost support information on 45 days' notice, defeating such protections.

Consumers might benefit from lower rates in the short term, but not in the long term, if competition is inhibited by predatory pricing. TRA believes that it would be premature to eliminate the lower band limits until competition substantially increases within each geographic market, as demonstrated by the factors discussed in Section B above.

2. Revision of Baskets

The present composition of the price cap baskets in terms of service categories within each basket was designed to prevent cross-subsidization of more competitive services by less competitive services by grouping services subject to similar levels of competition within the same basket. FNPRM at ¶ 86. Noting that competition within the different service categories may emerge at different rates, the Commission has asked whether it should reconfigure the composition of the price caps baskets to reflect different levels of competition. Id. At this juncture, such reconfiguration would be premature; as discussed above, competition

is not yet a compelling force. Nonetheless, TRA agrees with the Commission that as competition develops, periodic review of this issue would be appropriate. Such ongoing analysis should be aimed at realigning price caps baskets to reflect emerging competition. Although competition may also develop at different rates among geographic areas, creation of different baskets for different geographic areas would be unduly cumbersome and difficult to administer.

3. New Services

Another reform proposed in the FNPRM is the division of new LEC services[30/] into two categories, Track 1 services and Track 2 services. FNPRM at ¶ 45. Track 1 services would be subject to the existing regulatory requirements of 45 days' advance filing accompanied by cost support data. Id. at ¶ 41. Because of concerns that this process is unduly burdensome and may impede the swift introduction of new services, id. at ¶ 44, the Commission has proposed that certain new services be subject to Track 2 (relaxed) regulation, under which new services could be introduced on only 14 days' notice with limited cost support showing only that the rates for the new service are sufficient to recover the direct costs of the service. Id. at ¶ 49.

An obvious issue that arises from this proposal is how to categorize new services. The Commission has proposed classifying as Track 1 services only those new services that the Commission requires the LECs to offer and those services that are essential to the LECs' competitors. FNPRM at ¶ 47. TRA supports this proposal, but suggests that services that

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[30/] A "new service" is any service that expands the "range of [service] options already available to consumers." FNPRM at ¶ 39.

could have a cognizable economic effect on other services, such as interexchange services and commercial mobile radio services ("CMRS"), also be classified as Track 1 services.

As to implementation of the two-tiered system, the Commission has proposed that the price caps LECs seeking Track 2 treatment of a new service be required to file a petition with the Common Carrier Bureau for regulation of the new service under Track 2. FNPRM at ¶ 48. The petition would be deemed granted after 10 days unless the Bureau orders otherwise. TRA believes that an automatic grant of this sort interferes with the ability of the public to participate in the Commission's consideration of the LEC petition.

4. Restructured Services

The Commission also has proposed reducing the current 45-day notice period for restructured services to 15 days for rate increases and 7 days for decreases.[31] The 45-day period was originally adopted to detect discriminatory pricing and unreasonable rates. FNPRM at ¶¶ 50-51. However, the Commission believes that as competition increases, the risk of unreasonable rates will decrease. Even if that is true, there is inadequate competition for LEC services at this point to justify reducing the 45-day notice period for restructured services. Thus, the proposal to reduce the current notice period should be rejected until such time as sufficient competition exists to justify departure from the current notice period.

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[31] A restructured service replaces an existing service.

5. Alternative Pricing Plans

Alternative Pricing Plans ("APPs")[32] are currently regulated as new services. FNPRM at ¶ 52. The Commission currently permits an LEC to offer volume and term discounts on certain transport services[33] if the LEC can show a certain level of demand for expanded interconnection services in a particular "study area" or "density-based zone." Id. at ¶ 55. The purpose of allowing these discounts was to permit LECs to respond to competition from alternative access providers and to encourage efficiency. Such discounted plans are permitted if they are justified by underlying costs and not otherwise unlawful. Id. Although smaller IXCs objected to such volume discount plans when proposed on the grounds that they would benefit primarily AT&T,[34] the Commission now says that it found that "term discounts were not controversial." Id. at ¶ 55.

The Commission proposes permitting APPs other than the volume and term discounts it presently permits and reducing the regulation of APPs to require only filing on 14 days' notice, without cost support. If, however, the LEC converts the APP to a permanent offering after 90 days, it would be required to file tariff revisions which would be evaluated as a new service.

TRA cautions the Commission to consider the effect on interexchange services providers of any action it takes with respect to APPs. If the potential exists to disproportionately advantage some IXCs over others, the Commission should take steps to

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[32] Alternative Pricing Plans permit the customer to self-select optional discounted rates for existing services that the carrier continues to offer to other customers under the original terms.

[33] These services are entrance facilities, interoffice facilities, and tandem-switched transport. FNPRM at ¶ 55.

[34] Switched Transport Expanded Interconnection Order, 8 FCC Rcd. 7374 (1993) at 7434, ¶ 117.

avoid such a result. The Commission should also be wary of the use of APPs as vehicles for predatory pricing.

6. Part 69 Waiver Requests

The Commission also has proposed reforms to the current Part 69 waiver process, with which LECs must comply when they seek to introduce a new rate element for interstate switched access service. FNPRM at ¶ 68. The objective of the proposed reforms is to encourage LECs to introduce new switched access services by expediting the introduction of new services without unnecessary administrative delay. Id. at ¶ 66.

Apparently, the LECs have taken the position that new technologies and services do not readily fit within Part 69's rate structure requirements; and the waiver process is costly, time consuming, and impedes development and introduction of new services. FNPRM at ¶ 69. The Commission intends to review Part 69 in more depth in another proceeding, but believes that some immediate changes are desirable. Id.

Thus, the Commission proposes that when a LEC seeks to introduce a new rate element for a switched access service, it will still be required to petition for waiver of Part 69's requirements, but it will have to show only that the offering is in the public interest. FNPRM at ¶ 71. The Commission has asked for comment on the criteria on which the public interest determination should be made. TRA proposes that such criteria include, at a minimum, (1) that the offering poses no risk of adverse effects on competition, either in access services or other services that depend on them (*e.g.*, interexchange services, CMRS); (2) that the offering is made available on nondiscriminatory terms for resale at rates that only recover LECs' direct

costs; and (3) that the offering does not alter an existing service in a manner that materially adversely impacts existing customers of the service.

The Commission also has proposed that, once one LEC obtains a grant of such a petition, other LECs need not file petitions, but must only certify that they intend to provide the same service with the same rate elements. These filings would be automatically approved after 10 days unless they raise issues not considered in the initial grant. FNPRM at ¶ 71. It is not clear whether the public would have an opportunity to comment on such certifications, but public comment should be permitted.

Finally, the LECs would be permitted to petition the Common Carrier Bureau for regulation of the new rate elements under Track 2, as discussed above, with automatic grant of the petition after 10 days unless the Bureau orders otherwise. As noted in Subsection 3 above, a 10-day period is too short for the public to evaluate and comment in a meaningful fashion. And automatic grant after 10 days creates a presumption of legality and removes the burden of proof that should be on the carrier.

D. Requests for Streamlined Regulation Should Be Denied Absent a Compelling Demonstration of Substantial Competition in the Relevant Product and Geographic Markets.

The Commission has proposed granting streamlined regulation of certain LEC services within certain geographic areas if an LEC is able to demonstrate that actual "substantial competition" exists in the product and geographic market. TRA concurs with this proposal. The proposed standard is more stringent than the standard for determining a LEC's eligibility for regulatory relief within the price caps system, since streamlined regulation would give the LEC even greater pricing flexibility than the regulatory relief measures discussed

above. FNPRM at ¶ 127. The result of streamlined regulation would be that LECs could make tariff filings on 14 days' notice, and that such filings would be presumed lawful for purposes of tariff review, would not be required to be accompanied by cost support data, and would no longer be subject to price caps bands, ceilings, and floors. In addition, individually negotiated arrangements with customers might be permitted for services subject to streamlined regulation, as discussed in Section E, below. Id. at ¶ 128-29.

The Commission has proposed using the same analytical framework it used in the Interstate Interexchange Competition proceeding, CC Docket No. 90-132, to determine which LEC services should be subject to streamlined regulation. FNPRM at ¶ 130. Those criteria, which were used to determine whether AT&T services should be subject to streamlined regulation, included demand responsiveness, supply responsiveness, market share, and AT&T's pricing behavior; however, direct application of the same methodology may not be appropriate in this context because LECs control bottleneck facilities (thereby giving them more opportunities for anticompetitive or abusive behavior) and AT&T did not.

1. Proposed Factors for Determining When Streamlined Regulation is Warranted.

As noted above, the Commission has proposed subjecting a price cap LEC service to streamlined regulation within a particular geographic market when such service is subject to substantial competition within that market; and it has proposed that competition be measured by a combination of four factors: supply responsiveness, demand responsiveness, market share, and pricing trends. These factors would be assigned varying degrees of importance, and TRA believes the weighting of factors proposed in the FNPRM should be re-evaluated, as explained below.

a. Demand Responsiveness

Demand responsiveness measures the sensitivity of quantity demanded to price changes, expressed in terms of that percentage change in quantity demanded, following a one percent change in price. FNPRM at ¶ 134. An example of demand responsiveness (also known as "demand elasticity") is found in the Commercial Services Order,[35] where the Commission streamlined regulation of certain AT&T business services in part because of evidence that commercial customers were sophisticated enough to move their interexchange traffic to other carriers and had done so. Based on this evidence, the Commission concluded that a high level of demand responsiveness existed for interexchange business services, which in part persuaded the Commission that competition was sufficient within that product market to justify streamlined regulation.[36]

The FNPRM provides a summary of selected quantitative data that the Commission cited as establishing the existence of high elasticity of demand for interexchange business services. For example, the Commission noted that each year, some 23% of AT&T's commercial interexchange customers change from other carriers to AT&T or vice versa.[37] TRA is aware of no numerical data for any LEC services that is remotely comparable to the figures that persuaded the Commission of the demand responsiveness of interexchange business services and that would suggest cross-elasticity of demand for any local exchange services.

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[35] Revisions to Price Cap Rules for AT&T Corp., 10 FCC Rcd. 3009 (1995) ("Commercial Services Order")

[36] FNPRM at ¶ 136 (citing Commercial Services Order, 10 FCC Rcd.3009 at 3016).

[37] Commercial Services Order, 10 F.C.C. Rcd. 3009 at 3016 (cited at FNPRM, ¶ 136).

TRA supports the Commission's proposal to make demand responsiveness among the LECs' customers an "important factor in assessing the level of competition for LEC services for purposes of determining whether a service should be accorded streamlined regulation." FNPRM at ¶ 137. In particular, TRA supports the Commission's definition of demand responsiveness in the interstate access market as "where [1] services comparable to those offered by the LECs are available to their customers, [2] a significant number of those customers have the ability to evaluate the full range of market options available to them, and [3] these customers do in fact exercise these options." Id. Demand responsiveness should be a fairly reliable factor in ascertaining the degree of competition in interstate access services even though there are relatively few purchasers of such services because the purchasers are sophisticated and can evaluate and choose competitive options. Care should be taken, however, not to confuse demand responsiveness with a need for redundancy which a LEC simply cannot provide because it is the primary provider.

b. **Supply Responsiveness**

The Commission has stated that supply responsiveness (or "supply elasticity"), which measures the percentage change in supply that results from a one percent increase in the price of a product, "is a critical element in evaluating the level of competition for access services." FNPRM at ¶ 138. High supply elasticity indicates ease of entry and thus that attempts by incumbents to raise prices will result in new entry; low supply elasticity indicates the presence of market power.

There are two potential sources of supply by competitors which serve as measures of supply elasticity – excess existing capacity, and newly constructed capacity, which is tenable

only if barriers to entry are low.[38] The presence of available, unused capacity or low barriers to competitive entry can limit an incumbent's ability to raise prices above competitive levels. FNPRM at ¶ 139.

In the Interstate Interexchange Competition proceeding,[39] the Commission concluded that high supply elasticities existed in the interexchange business services market because AT&T's competitors had enough unused existing capacity to absorb a significant portion of AT&T's traffic and because AT&T's commercial long distance traffic represented a small portion of all switched traffic.[40] In the Commercial Services Order,[41] the Commission reasoned that, for excess capacity to constrain competition, "competitors must be willing and able to serve a significant portion of AT&T's commercial long distance traffic in response to a price increase, but by no means all of its traffic, in order to deter a price increase." FNPRM at note 213.

Supply elasticity should be a factor in determining whether a LEC service is eligible for streamlined regulation. The relevant factors to consider in evaluating supply elasticity should be whether an LEC's competitors have enough readily available capacity to constrain the LEC's market behavior and inhibit it from charging excessive rates; whether barriers to entry by competitors are low; and whether competitors exist that are willing and able to serve a significant portion of the incumbent's traffic in response to a price increase. With respect

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[38] Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880 (1991) ("Interstate Interexchange Competition") at 5888.

[39] 6 FCC Rcd. 5880 at 5888-89.

[40] FNPRM at nn. 208, 209.

[41] Commercial Services Order, 10 F.C.C. Rcd. 3009 (1995) at 3017, ¶ 22.

to this latter point, competitors must be positioned to serve the market, not merely have fiber in selected locations. LECs seeking streamlined regulation should be required to submit the data and information needed to assess these factors reliably.

c. **Market Share**

In the Interexchange Order,[42] the Commission considered AT&T's market share in the business services market relative to that of its competitors and determined that market share alone does not establish that a firm possesses market power. FNPRM at ¶ 142. Here, the Commission is further de-emphasizing the importance of market share as an indicator of competition and market power. Id. at ¶ 143. The Commission states that "a high market share does not necessarily confer market power. A company that enjoys a very high market share will be constrained from raising its prices above cost if the market is characterized by high supply and demand elasticities." Id. (citing Interexchange Order, 6 FCC Rcd. at 5887).

TRA submits that, by emphasizing demand and supply elasticities, the Commission is confusing potential competition with actual competition, and that, regardless of the level of potential competition that exists, the most significant consideration in determining whether to streamline regulation of LEC services should be the level of actual competition, as measured by market share.

d. **Pricing of Services Under Price Cap Regulation**

Similarly, the Commission has overemphasized the significance of LEC pricing behavior, particularly where an LEC prices services below the price cap ceiling for a sustained

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[42] 6 FCC Rcd. 5880

period of time. FNPRM at ¶ 145. The Commission believes such behavior indicates that the services are subject to competitive pressures, especially where high supply and demand elasticities exist, although it admits that such pricing behavior is not "necessarily a reliable measure of competition in a market without such high supply and demand elasticities." Id. TRA submits that the opposite may be true: Sustained pricing below the maximum permitted level may indicate an attempt to block competition by reducing the stimulus for competitive entry and making competitive entry more difficult for firms unable to meet or beat the LEC's prices. This would particularly be so in markets where high demand and supply elasticities exist, where the LEC would have the greatest incentive to keep prices low to deter competitive entry by minimizing competitors' potential rewards and return on investment.

The Commission should re-evaluate the significance it places on supply and demand elasticities as "the most important factors to be considered in assessing the level of competition for LEC services for purposes of streamlined regulation." FNPRM at ¶ 146. TRA believes that the most reliable measure of competition is market share, and urges the Commission to adopt this view.

2. Procedural Matters

LECs seeking streamlined regulation of certain services within certain geographic markets should be required to submit petitions for waiver of the rules that would otherwise apply to the services, they should have the burden of proving that substantial competition exists within the relevant product and service markets, and that the public interest will be served by the requested waiver. Meaningful opportunity for public comment on such petitions should be permitted. Standards similar to those applied to AT&T in Docket 90-132 and 94-1

should be used to evaluate the petitions, as discussed above, except that the Commission should apply each standard more strictly, in light of the LECs' control of bottleneck facilities and their inherent ability to subsidize streamlined services with revenues from basic residential service. Each element of the analysis should be weighted as discussed above. For example, if a LEC makes a strong demonstration of sustained below-cap pricing behavior but has a significant market share, its petition should be denied for failure to establish the presence of meaningful competition.

E. Contract Carriage Should Only Be Permitted for Streamlined LEC Services if Competitive Safeguards Are Adopted.

TRA supports, with some qualifications, the Commission's proposal to permit LECs to enter into contract carriage arrangements with customers, as long as all of the conditions for such arrangements proposed by the Commission (as well as those proposed by TRA below) are adhered to.

As to the Commission's proposed conditions, which TRA endorses, contract carriage should only be permitted for services subject to streamlined regulation and in geographic markets where LECs are subject to substantial competition.[43] Second, tariffs summarizing the terms of contract arrangements as enumerated by the Commission, FNPRM at note 225, should be filed on at least 14 days' notice. Third, discrimination among similarly situated customers should be prohibited.

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[43] The Commission suggests, but does not explicitly state, that "substantial competition" would mean that "competitors have invested substantial sunk costs necessary to participate in the access market, [since] the existence of those facilities will deter the incumbent from raising rates in the future." FNPRM at ¶ 149. TRA would add to this definition that competitors are operating viable competitive businesses.

In addition to these requirements, TRA proposes that LEC contract carriage be conditioned on the following additional requirements, all of which should further promote competition and help to discourage anticompetitive behavior. The LECs seeking to enter into contract arrangements should be required to: (1) make available to resellers on a nondiscriminatory basis all contracts entered into with any other customer; (2) provision orders for contract services within a reasonable time, *e.g.*, 30 days; (3) establish deposit requirements that are reasonable in relation to the LEC's costs and not set in a manner that discourages purchase of the services; (4) establish termination provisions, including termination fees, that are reasonable in relation to the LEC's costs, that do not unreasonably discourage early termination of term plans, are not punitive, and do not provide a windfall for the LECs; and (5) require advance customer approval for any material change to term plans.

While contract carriage could bring customers significant benefits, it could also provide incumbent LECs with an effective weapon for inhibiting or eliminating competition, particularly from newer, less capitalized, market entrants, by enabling the LECs to manipulate their pricing for anticompetitive purposes. Thus, it is critical that substantial competition in the relevant product and geographic markets be demonstrated before contract carriage is permitted.

The Commission should periodically evaluate the effects of contract carriage on the marketplace and particularly on competition to determine whether the expected benefits of contract carriage are being achieved and carrier abuses are not occurring, particularly, that competition in the relevant product and geographic markets is not being inhibited by contract carriage.

F. It Is Premature to Consider Classifying Price Cap LECs as Nondominant.

TRA concurs with the Commission's view that, unlike the historical "all-or-none" approach to the dominant/nondominant classification, LECs could be classified as dominant or nondominant only for certain services and certain geographic areas -- indeed, this approach would seem appropriate in light of the different rates at which competition will likely emerge in different markets. FNPRM at ¶ 153.

However, TRA strongly believes that it is premature to consider issues such as defining the standards by which dominance will be judged at this time. As discussed above, competition in markets traditionally dominated by the LECs is only beginning to emerge in relatively few geographic areas. Much can change -- in terms of technology, competitive conditions, customer demand and tastes, economic factors, and legal and regulatory restrictions and opportunities -- between now and the day when sufficient competition will exist to make a realistic case for LEC nondominance in any service within a LEC's own service area.

When the time comes to consider according nondominant status to LECs, the general issue whether even to consider classifying some LEC services as nondominant should be carefully evaluated in a rulemaking proceeding of general applicability rather than on an *ad hoc*, case-by-case basis, such as through multiple petitions for waivers or motions for declaratory ruling. But this is neither the time nor the proceeding for consideration of such matters. There are already enough -- indeed, some might say more than enough -- difficult and complex issues to resolve in this proceeding to attempt to give due consideration to additional matters which raise challenging questions and in any event are unnecessary to consider at this time because circumstances do not warrant imminent consideration.

III.

CONCLUSION

The Telecommunications Resellers Association urges the Commission to proceed with extreme care in this proceeding, and reemphasizes here the need to establish the existence of meaningful, actual competition before existing regulation of the LECs is relaxed.

Respectfully submitted,

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