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January 27, 2016

REDACTED – FOR PUBLIC INSPECTION

By ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
455 12th Street, S.W.
Washington, DC 20054

Re: WC Docket No. 05-25, RM-10593; **Public** Version of AT&T's Comments

Dear Ms. Dortch:

Pursuant to the *Modified Protective Order*, *Second Protective Order*, and *Data Collection Protective Order* adopted by the Commission WC Docket No. 05-25, AT&T Inc. ("AT&T") respectfully submits the enclosed **Public** version of its Comments in this proceeding.[1] Pursuant to the Commission's January 21, 2016 *Public Notice*,[2] AT&T has marked as Highly Confidential all statements in the enclosed comments that report "the results of any analyzes (including statistical descriptions) performed on the . . . Highly Confidential data submitted in response to

[1] 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, *Modified Protective Order*, 25 FCC Rcd. 15168 (2010) ("*Modified Protective Order*"); 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, *Second Protective Order*, 25 FCC Rcd. 17725 (2010) ("*Second Protective Order*"); 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, *Order and Data Collection Protective Order*, 29 FCC Rcd. 11657 (2014) ("*Data Collection Protective Order*").

[2] 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, *Public Notice: Parties Are Reminded That Results of Analyses of the Highly Confidential Data Filed In Response to the Business Data Services (Special Access) Data Collection Are Highly Confidential*, WC Docket No. 05-25; RM-10593 (rel. Jan. 21, 2016) ("Public Notice").

the Commission's business data services data collection," based on the Bureau's assertion that such results "are themselves Confidential or Highly Confidential, depending on the data from which they are derived."[3] The data that AT&T has designated as Highly Confidential Information in its Comments are references to the results of the analysis reported by three economists (Drs. Mark Israel, Daniel Rubinfeld, and Glenn Woroch) ("Economist Paper"),[4] which has been separately filed in this proceeding.

AT&T respectfully requests that the Commission permit AT&T and the economists to remove the confidentiality designations associated with the results set forth in the Economist Paper from both AT&T's Comments and from the Economist Paper itself. The Commission should grant this request for two reasons. First, these data do not raise any confidentiality concerns, because they report only highly aggregated data that do not reveal any competitively sensitive information for any entity. Second, contrary to the statements in the Public Notice, these aggregated analyses do not fall within the definition of "Highly Confidential" under the *Data Collection Protective Order*; indeed, the *Data Collection Protective Order* expressly *prohibits* parties from designating such results as Highly Confidential. Making these data publicly available would serve the public interest by making important and relevant information that is not competitively sensitive more broadly available to interested parties in this proceeding, thus further facilitating informed public input related to the issues raised in this proceeding.

1. *The Data Do Not Raise Confidentiality Concerns.* The aggregated analytical results that AT&T is asking to be made public do not raise any confidentiality concerns. These data show, at a highly aggregate level, the scope of competition for special access services, including (1) the aggregate number and percentages of census blocks that have special access demand where competitors have deployed their own facilities and (2) the percentage of potential demand within these census blocks (based on non-confidential data from Dun and Bradstreet). The release of these results to the public would not threaten competitive harm to any party, and would further the Commission's goal, as stated in the *Data Collection Protective Order*, of "balanc[ing] the need of parties to participate in the rulemaking proceeding in a meaningful way with the competitively sensitive nature of the data collected."[5] The calculations are aggregated on an industry-wide basis, and are reported only at the national and MSA geographic levels. These aggregate results do not identify which competitors are in any particular census block or even in any given MSA; they do not identify which census blocks have competitive facilities (nor which census blocks do not); and they do not provide any information about the location, facilities, strategic plans, revenues, or service offerings of any individual competitor. Indeed, this level of aggregation appears to provide less detailed information than the publicly available

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[3] *Id.* at 1.
[4] Mark Israel, Daniel Rubinfeld and Glenn Woroch, *Competitive Analysis of the FCC's Special Access Data Collection: White Paper*, filed in WC Docket No. 05-25 (Jan. 27, 2016).
[5] *Data Collection Protective Order* ¶ 11.

National Broadband Plan mapping data, which specifically and publicly identify which census blocks have broadband connections. The data here, by contrast, are simply aggregate market-wide statistics regarding the overall state of competition for special access service, and the extent that competitors have deployed alternative facilities-based networks across the country. The public release of the final results of these calculations (as opposed to the underlying data themselves) does not implicate the legitimate confidentiality interests of any party to this proceeding.

Indeed, these highly aggregated data that merely indicate the scope of alternative networks are less competitively sensitive than the aggregated market share data that the Commission has already chosen to make public, which it derived solely and directly from the Highly Confidential data collection. For example, in the *Tariff Investigation Designation Order*,[6] the Commission publicly stated that "preliminary analysis of the Commission's special access data collection shows that revenues from such TDM services continue to make up in the range of sixty percent of the roughly \$40 billion annual special access market."[7] It further stated that "[p]reliminary review of the results of the Commission's special access data collection shows that as of 2013 incumbent LECs received roughly three-quarters of the approximately \$20 billion in annual revenues from the sales of DS1 and DS3 channel terminations, and received close to two-thirds of all revenue from TDM sales.[8] And, the Commission stated that "[p]reliminary analysis of the results of the Commission's special access data collection [shows that] TDM-based special access sales totaled approximately \$25 billion or about 60 percent of the total special access market of about \$40 billion."[9]

2. *The Data Are Not Highly Confidential Under The Protective Order.* The *Data Collection Protective Order* defines "Highly Confidential Information" as follows:

> "Highly Confidential Information" means information that is not otherwise available from publicly available sources; that the Submitting Party has kept strictly confidential; that is subject to protection under FOIA and the Commission's implementing rules; that the Submitting Party claims constitutes some of its most sensitive business data which, if released to competitors or those with whom the Submitting Party does business, would allow those persons to gain a significant advantage in the marketplace or in

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[6] *See* Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, *Order Initiating Investigation and Designating Issues for Investigation*, WC Docket No. 15-247 (rel. Oct. 16, 2015) ("*Tariff Investigation Designation Order*").
[7] *Id.* ¶ 2.
[8] *Id.* ¶ 3.
[9] *Id.* ¶ 14.

> negotiations; and that is described in Appendix B to this Data Collection Protective Order, as the same may be amended from time to time.[10]

The data contained in AT&T's comments and in the Economist Paper do not fall within this definition. As explained above, these data are highly aggregated data that provide no information that could be used "to gain a significant advantage in the marketplace or in negotiations."

Moreover, the definition of Highly Confidential Information expressly prohibits parties from designating the type of aggregated information at issue here as Highly Confidential. This definition states that Highly Confidential Information is that "described in Appendix B." And Appendix B states: "Information may be designated as Highly Confidential Information pursuant to the Data Collection Protective Order only if it contains information regarding" a list of specified categories.[11] The data contained in AT&T's comments and in the Economist Paper clearly do not fall within any of the listed categories. Consequently, under the Protective Order, parties are *prohibited* from designating these data as Highly Confidential.

The Public Notice relies on the following statement for the proposition that any data derived from Highly Confidential Data must be designated as High Confidential Information: "Parties filing comments or other filings in the special access rulemaking proceeding, WC Docket No. 05-25, that contain . . . Highly Confidential Information *derived from the data submitted in response to the Data Collection* shall submit to the Secretary's Office one copy of the filing containing the Confidential or Highly Confidential data under seal."[12] But the Protective Order is merely making the point that information derived from the data collection that *meets the definition* of "Confidential" or "Highly Confidential" must be filed as such. The Protective Order cannot be read to say – consistent with the other provisions of the Protective Orders described above – that *any* information "derived" from Highly Confidential data is necessarily Highly Confidential itself.[13]

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[10] *Data Collection Protective Order*, App. A, at 14.

[11] *Id.*, App. B, at 22. *See also id.* at 21 ("Data may be designated as Highly Confidential Data pursuant to the Data Collection Protective Order only if it contains information regarding. . . .").

[12] *Id.* ¶ 10 (emphasis added).

[13] Similarly, the Commission cites paragraph 21, but that paragraph is dealing only with the specific situation in which a Reviewing Party wants to pull an analysis of the data out of the secure environment of the Data Enclave (and prescribes procedures that NORC would use to ensure that data sets themselves are not pulled). Such analyses, when pulled out, remain Confidential or Highly Confidential "as those terms are defined in the Protective Order" – again not merely because they may have been pulled out of the Data Enclave. That is not the situation here, however, because AT&T is merely asking to refer to results "in its comments" that do not meet the definition of Confidential or Highly Confidential. *Cf.* Protective Order ¶ 20 ("We clarify that authorized parties are allowed to

The Public Notice is also inconsistent with the Commission's prior interpretations of the *Data Collection Protective Order*. As noted above, contrary to the Public Notice's suggestion that all aggregated data derived from the Highly Confidential data contained in the 2013 Special Access Data Set should be treated as Highly Confidential Information, the Commission itself has already publicly disclosed its own aggregated analyses of the Highly Confidential Data with no regard for the parties (principally the ILECs) that submitted the underlying data. The Commission's prior disclosures, which purport to reveal ILEC market shares, are more competitively sensitive than the highly aggregated data reported in AT&T's Comments and in the Economist Paper, which, as explained above, merely identify the portion of census blocks where one or more competitors have deployed facilities (where no specific competitors are identified and the specific census blocks where competitive facilities have been deployed are not disclosed).[14]

For all of these reasons, AT&T respectfully requests that the Commission permit AT&T and the economists to remove the confidentiality designations in the Comments of AT&T Inc. and in the Economist Paper.

Respectfully submitted,

Christopher T. Shenk

Enclosure

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reference specific data points in their comments, subject to designation and redaction requirements as outlined in the Protective Order").

[14] Nor is the aggregated data at issue "Confidential Information" under the *Data Collection Protective Order*. Confidential Information is information that is not otherwise available from publicly available sources and that is subject to protection under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Commission's implementing rules." *Data Collection Protective Order*, App. A, § 1. As the Commission has explained, "FOIA Exemption 4 . . . is most relevant to the instant Data Collection," and that provision states that the government can withhold from public inspection "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Id.* ¶ 4. As explained above, the aggregated data at issue here does not constitute trade secrets, financial information, or any privileged or confidential information. Nor does it disclose any competitively sensitive information for any entity.

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

In the Matter of	)	
Special Access Rates for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

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January 27, 2016

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COMMENTS OF AT&T INC.

Pursuant to the Commission's December 21, 2015 Order,[1] AT&T Inc. ("AT&T") respectfully submits these comments in response to Section IV.B of the Commission's December 18, 2012 *Notice*.[2]

INTRODUCTION AND SUMMARY

The Commission's pricing flexibility rules are based on a simple, economically unassailable principle: there is no basis for price cap regulation in areas where competitors have deployed their own facilities-based networks. As the Commission and the D.C. Circuit have recognized, facilities-based competition both ensures that incumbent LECs charge rates that are

[1] Order, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593 (rel. Dec. 21, 2015) (extending comment deadlines).

[2] Report and Order and Further Notice of Proposed Rulemaking, *Special Access for Price Cap Local Exchange Carriers*, 27 FCC Rcd. 16318 (2012) ("*Notice*").

just and reasonable and prevents incumbent LECs from attempting exclusionary or predatory pricing practices.[3]

Accordingly, the only controversy in this proceeding is not *whether* the Commission should eliminate price cap regulation where competitors have deployed such facilities, but rather what is the best way to determine where such sunk competitive facilities exist. The Commission's current pricing flexibility rules reflect a compromise: in an attempt to keep the process of granting and implementing relief administratively manageable, the Commission relies on the easily verified evidentiary proxy of facilities-based collocation, and it assesses Phase I and Phase II relief on a MSA-wide basis. The CLECs that seek regulatory advantages over their ILEC competitors, however, have argued for nearly a decade that the triggers have granted relief too broadly. They argue that the current triggers have resulted in ILECs gaining pricing flexibility in areas that are not subject to competitive constraints. But at the same time, these CLECs refused to disclose the locations of their extensive facilities-based networks in a manner that would allow the Commission to properly evaluate their claims. The Commission ultimately required these CLECs to disclose data about their deployments as part of the Commission's mandatory 2013 data collection to test the accuracy of the proxies in the rules. This data collection was unprecedented in scope and includes detailed data about the location and reach of CLEC facilities-based networks as of 2013.

The results of that data collection are now in and were finally made partially available for review and analysis during the past few months. And even the compressed review of the data show what one would expect after three decades of competitive entry and investment:

[3] Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 80 (1999) ("*Pricing Flexibility Order*"), *aff'd, WorldCom, Inc.* v. *FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001).

competitors have deployed extensive facilities-based networks capable of serving the overwhelming majority of special access demand across the nation. Indeed, as the data collection confirms, special access demand is heavily concentrated in urban areas and other business districts, and competitors have overbuilt these areas many times over.

Accounting for all relevant competitive facilities, which include the cable company connection data from the National Broadband Plan mapping project, competitors have deployed their own competitive facilities in nearly all census blocks **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *nationwide* that contain special access demand, and those census blocks, in turn, account for virtually every special access connection **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] [redacted] **[END HIGHLY CONFIDENTIAL]** and business establishment **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**. To be sure, there are some outlying areas that contain only incumbent LEC facilities, but those areas represent only a tiny fraction of the overall potential demand and, in all events, remain overwhelmingly subject to price caps today. In other words, the data confirm that the triggers, on balance, were extremely *conservative* rather than overbroad – *i.e.*, they were far more under-inclusive, in the sense of leaving areas with sunk facilities and multiple competitors under price caps, than they were over-inclusive. And, notably, these data *understate* the true extent of competitive deployment, because, among other reasons, the data are from 2013 and thus do not account for the explosive growth and facilities investment undertaken by cable companies and other Ethernet providers over the last two years.

This analysis leads to two inescapable conclusions. *First*, these data confirm that there is no basis to revisit any grant of Phase II relief. In the MSAs in which the Commission has granted Phase II relief for channel terminations, competitors have deployed sunk facilities in census blocks representing almost all **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** potential demand. Thus, contrary to CLEC assertions, the existing Phase II triggers are *not* over-inclusive. To the extent there remain certain areas where competition is lacking, those areas account for a tiny portion of the special access marketplace, which, in all events, benefit from the competition that exists elsewhere. Clearly, the administrative cost of reimposing and administering a system of price cap regulation for these demand-empty census blocks far outweighs any benefit.

Second, and equally important, the data collection shows that there are a number of Phase I and price cap MSAs in which competitors have deployed extensive facilities-based networks on par with the extensive deployment observed in Phase II MSAs. These include, among many others, large cities in the AT&T region like Chicago and Atlanta, which, the data confirm, are among the most intensely competitive special access marketplaces in the country. It makes no sense to continue saddling incumbent LECs (but not their competitors) with price cap regulation in these areas. In fact, based on the data before the Commission today, the Commission should remove price cap regulation from these and other areas in which sunk CLEC facilities reach the lion's share of demand.

But that is just the first step that the Commission must take. Going forward, in the absence of massive data collections, the Commission will need better proxies for determining when to further extend pricing flexibility relief. One option would be to maintain the existing MSA-based approach, which offers significant administrative advantages, while liberalizing the triggers. AT&T has not yet had time to test alternative triggers against the data to determine an alternative trigger that most appropriately addresses the problem of under-inclusivity. But it is evident that the Commission should do just that. Alternatively, the Commission could maintain the existing trigger but supplement its MSA-based approach with an alternative, additional path for obtaining more granular relief. Whichever approach the Commission takes, it should address the inappropriate exclusions that result from application of the current triggers.

Finally, *if* the Commission chooses to abandon its MSA-based approach in favor of a more geographically granular approach, it must (1) do so in both directions, and (2) ensure that any alternative is administratively workable. It would be patently arbitrary to roll back pricing flexibility in ILEC-only Phase II census blocks (or any other smaller geographic unit) without also *extending* Phase II relief to the comparably granular geographic areas in non-Phase II MSAs where the data collection unequivocally shows, based on data submitted by the competitors themselves, that sunk facilities have been deployed. And it would be equally arbitrary to adopt a pricing regime that imposes a patchwork quilt of pricing requirements that will unduly complicate the contracting process and confuse customers.

I. THE DATA COLLECTION CONFIRMS THAT THE COMMISSION'S PRICING FLEXIBILITY TRIGGERS WERE OVERLY CONSERVATIVE.

There can be no legitimate dispute that price cap regulation should be eliminated, at a minimum, from areas in which competitors have deployed sunk facilities. The Commission's data collection now confirms that competitors have in fact deployed such facilities in almost every area in which demand for special access exists, and that the Commission's "triggers" were thus enormously overly conservative. The Commission should therefore both (1) affirm that there is no basis to revisit any grant of Phase II pricing flexibility and (2) extend Phase II relief, in a one-time reset based on the detailed data collection, to a number of additional MSAs that the data confirm have extensive facilities-based deployment on par with that in Phase II MSAs.

A. The Commission Cannot Lawfully Justify Price Cap Regulation in Areas Where Competitors Have Deployed Sunk Facilities.

The basic economic principles underlying the pricing flexibility rules are not in dispute. There is no justification for price cap regulation in areas in which competitors have deployed sunk facilities. Prior Commission and federal court decisions have recognized that the presence of such facilities ensures that ILEC prices will remain at just and reasonable levels and deters ILECs from attempting exclusionary or predatory pricing practices, thus eliminating any need for price cap rules. As the Commission explained in 1999, once a *facilities-based* competitor has

> entered the market and cannot be driven out, rules to prevent exclusionary pricing behavior are no longer necessary. . . . If a competitive LEC has made a substantial sunk investment in equipment, that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market. Another firm can buy the facilities at a price that reflects expected future earnings, and, as long as it can charge a price that covers average variable cost, will be able to compete with the incumbent LEC. . . . [T]he presence of facilities-based competition with significant sunk investment makes exclusionary behavior highly unlikely to succeed.[4]

The D.C. Circuit agreed with this reasoning. *WorldCom, Inc.* v. *FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001) ("the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed," because "that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market").

The Commission further explained why the presence of facilities-based competition provides a sufficient basis to ensure that ILEC rates and practices will be constrained. Special access customers are "sophisticated purchasers of telecommunications services, fully capable of finding competitive alternatives where they exist and determining which competitor can best

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[4] *Pricing Flexibility Order* ¶ 80.

meet their needs."[5] Accordingly, where there are competing facilities-based alternatives, customers will – and indeed do – seek out and obtain the best combination of services and pricing to meet their individual needs, which ensures that no competitor can charge rates that fall outside the Communications Act's broad zone of "reasonableness."[6]

The underlying theory of the pricing flexibility rules also correctly recognizes that it is not necessary that a competitor have a connection from its transport network to every single building in an area for that competitor to constrain ILEC prices in that area.[7] Special access competition does not occur merely or even primarily among carriers that *already* have an existing connection to a building, because additional carriers with the ability to deploy a connection (based on, for example, a large fiber ring or transport facilities that are near the building) also vigorously compete for the business of the building's special access customers. Both the Commission and the D.C. Circuit have expressly recognized the existence of this rather obvious competitive reality. Although this phenomenon is often referred to as "potential" competition, it is, in fact, more accurate to call it actual competition – existing facilities-based competitors are actually competing in the marketplace for the right to build (what remain

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[5] *Id.* ¶ 155.

[6] *See also id.* ¶ 153 n.389 (explaining that "it is unnecessary to extend the efficiency incentives of price cap regulation to services offered on a 'contract-type basis'") (citing Second Report and Order, *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, ¶ 193 (1990) ("*LEC Price Cap Order*")).

[7] *See* Mark Israel, Daniel Rubinfeld & Glenn Woroch, "Competitive Analysis of the FCC's Special Access Data Collection," WC Docket No. 05-25, filed January 27, 2016, Section II.B ("Israel-Rubinfeld-Woroch Analysis"); Declaration of Dennis W. Carlton and Hal S. Sider, ¶¶ 28-30 ("Carlton-Sider Decl."), attached as Exh. A to Comments of AT&T Inc., WC Docket No. 05-25 (Jan. 19, 2010).

"potential") direct connections to a location.[8] The Department of Justice likewise has found that special access competition from traditional CLECs constrains ILEC prices in any building that is sufficiently near, but not necessarily already connected to, their competitive sunk network facilities.[9]

The current controversy is thus not over *whether* price cap regulation should be eliminated where competitors have deployed such facilities, but instead over whether the current pricing flexibility test represents an appropriate, administratively workable means of identifying the geographic areas in which the factual pre-conditions for such relief are met. As the Commission recognized in 1999, this is merely a question of evidence; the Commission wanted to find an easily administrable evidentiary proxy for the existence of such sunk facilities without having to conduct a full-blown market power or dominant carrier analysis in each case.[10] In this regard, the D.C. Circuit expressly rejected the argument that the pricing flexibility triggers were unlawful merely because they were rough proxies that did not replicate a full nondominance (*i.e.*, market power) inquiry.[11]

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[8] *See WorldCom*, 238 F.3d at 458 ("the presence of substantial sunk investment, and the resulting *potential* for entry into the market, can limit anticompetitive behavior by LECs") (emphasis added; citing *Pricing Flexibility Order* ¶ 80).

[9] *See*, *e.g.*, Memorandum Opinion and Order, *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd. 5662, ¶¶ 41-42, 46 & nn.111-14 (2007) (describing and adopting "screens" employed by DOJ to determine whether a building could be served by alternative facilities, which recognize that competitors with facilities near a building can and do compete for customers in that building).

[10] *Pricing Flexibility Order* ¶ 78 (Commission sought an evidentiary proxy that "reasonably balance[d]" its two goals: "(1) having a clear picture of competitive conditions in the MSA, so that [it could] be certain that there is irreversible investment sufficient to discourage exclusionary pricing behavior; and (2) adopting an easily verifiable, bright-line test to avoid excessive administrative burdens"); *id.* ¶ 90 (rejecting market power and dominant carrier analyses because such analyses are "neither administratively simple nor easily verifiable").

[11] *WorldCom*, 238 F.3d at 459-61.

The Commission designed a system of "triggers" for two levels of relief (Phase I and Phase II) that was intended to be conservative, in at least two respects. First, the Commission chose to rely on facilities-based collocations – an easily verifiable piece of evidence within the possession of the ILECs – as an indicator of the presence of a more extensive fiber network.[12] Even in 1999, all parties understood that facilities-based collections would be a conservative indicator, because they would not capture direct connections or the use of non-ILEC carrier hotels.[13] They are even more conservative today, because cable companies generally do not rely on ILEC collocations at all. Second, the triggers grant relief on an MSA basis, but to ensure that relief was not granted prematurely, the Commission required the ILEC to show that facilities-based collocations existed in a very high percentage of the wire centers in a given MSA before it removed price cap regulation.[14] In many instances, the triggers permit only "Phase I" relief (which merely expands the opportunity to offer discount plans), even though the Phase I trigger indicates that sunk facilities exist in a significant portion of the MSA.[15]

Some purchasers of special access services (those that would benefit from further regulation of ILEC prices) have been complaining that the triggers are overbroad – *i.e.*, that granting relief on an MSA-wide basis has resulted in granting pricing flexibility in some areas

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[12] *Pricing Flexibility Order* ¶¶ 81, 84 (finding that "collocation by competitors in incumbent LEC wire centers is a reliable indication of sunk investment by competitors" and that "a collocation-based trigger provides an administratively simple and readily verifiable mechanism for determining whether competitive conditions warrant the grant of pricing flexibility").

[13] *See, e.g.*, *WorldCom*, 238 F.3d at 462 ("[t]he FCC also notes that there are reasons to believe that, if anything, collocation underestimates competition in relevant markets as 'it fails to account for the presence of competitors that . . . have wholly bypassed incumbent LEC facilities'" (citation omitted)).

[14] *Pricing Flexibility Order* ¶¶ 93, 100, 108, 148-50 (setting forth triggers for Phase I and Phase II pricing flexibility relief). The channel termination trigger for Phase II pricing flexibility relief requires collocation at fully 65 percent of wire centers (or wire centers that account for 85 percent of revenue). *Id.* at ¶ 150.

[15] *Id.* at ¶¶ 122-33 (discussing Phase I relief); *id.* at ¶¶ 153-57 (discussing Phase II relief).

where the incumbent is the only option for special access services. Nonetheless, when the Commission initiated a voluntary data request to test this hypothesis, the CLECs refused to provide the comprehensive data the Commission was seeking, including, most importantly, data on the location of their facilities. Based on the CLEC complaints, the Commission adopted a freeze on new applications for pricing flexibility anyway while it investigates the propriety of the triggers in this rulemaking.[16] And to test the accuracy of the triggers, the Commission has initiated a mandatory data request pursuant to which ILECs, CLECs, and to a lesser extent cable companies, were required to submit detailed data on the geographical extent of their facilities-based networks, so that the Commission can assess the extent to which the triggers match up to actual network deployment.

The results may explain why some CLECs resisted the data-based review the Commission has undertaken. They show, first, that there is no basis to revisit any existing grant of Phase II relief, as competitors have deployed their own facilities to address almost all **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of the available demand in Phase II MSAs. At the same time, they show that the Commission's triggers were actually *too* conservative and *under*-inclusive in that they fail to capture many markets, including Chicago and Atlanta, where competition is undeniably intense. These may not be the results that the CLECs predicted, but the Commission is obligated to follow the data wherever they lead.[17] This means that the Commission must: (1) affirm all existing grants of

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[16] Report and Order, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, 27 FCC Rcd. 10557 (2012) ("*Pricing Flexibility Suspension Order*").

[17] *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (to engage in reasoned decision making, an agency "must examine relevant data"); *Butte County, Cal.* v. *Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("an agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of § 706"); *Comcast Corp.* v. *FCC*, 579 F.3d 1, 7 (D.C. Cir. 2009) (vacating

Phase II pricing flexibility; (2) extend pricing flexibility to additional MSAs where, the data show, CLECs have made extensive sunk investments; and (3) establish a new, more liberal proxy for future grants of pricing flexibility. That proxy can be an MSA-based test with less stringent triggers or it can consist of the existing test supplemented by an option for more granular relief.

B. The Data Collection Confirms That The Pricing Flexibility Triggers Were Overly Conservative, And That Competitors Have Deployed Facilities to Serve the Vast Majority of the Nation's Special Access Demand.

The data confirm that the Commission's pricing flexibility triggers were too conservative. As Drs. Israel, Rubinfeld, and Woroch explain, the data show that competitors have now deployed sunk facilities in virtually every census block that contains special access demand, including outside Phase II areas.[18] Thus, far from showing, as the CLECs have claimed, that the triggers are too lenient, the data show just the opposite: that they result in unnecessary regulation of areas in which competition is robust.

First, the most complete and accurate measure of competitive deployment, which augments the data collection with cable connection data from the Commission's National Broadband Plan mapping project, confirms that, as of 2013, competitors had deployed facilities to serve almost all special access demand nationwide. Drs. Israel, Rubinfeld, and Woroch have

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Commission rule that capped the market share of any single cable television operator at 30% of subscribers because the Commission "fail[ed] to consider the impact of [direct broadcast satellite] companies' growing market share" and "the growth of fiber optic companies"); *Illinois Pub. Telecomm. Ass'n* v. *FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997) (vacating Commission rates for certain types of payphone calls because the Commission "failed to respond to any of the data showing that the costs of different types of payphone calls are not similar"); *Natural Res. Defense Council* v. *Herrington*, 768 F.2d 1355, 1391 (D.C. Cir. 1985) (agency may not "continue to rely on the market penetration algorithm and the ORNL model if further study in light of more complete information shows the model's prediction to be unreliable").

[18] Israel-Rubinfeld-Woroch Analysis, Section III.B.

analyzed the data to evaluate how many census blocks contained either (1) a CLEC connection,[19] (2) a CLEC or cable fiber route,[20] or (3) a cable connection (fiber or DOCSIS 3.0) as reported in the National Broadband Plan mapping project.[21] The results are striking: competitors have deployed their own competitive facilities in virtually every census block with potential special access demand nationwide **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**, and those census blocks in turn cover nearly every special access connection **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] [redacted] **[END HIGHLY CONFIDENTIAL]** and business establishment **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**.[22] In other words, competitive special access deployment today is essentially ubiquitous.

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[19] *Id*., Section III.A. These data are as reported in Table II.A.4 of the data collection, with the exception that Drs. Israel, Rubinfeld, and Woroch *excluded* CLEC connections which are identified as relying on unbundled network elements ("UNE") or unbundled common loops ("UCL"). *Id.* Excluding these CLEC connections renders the analysis conservative, because CLECs still purchase hundreds of thousands of UNEs nationwide and use them to compete against ILEC special access services. *Id*.

[20] *Id.* These data are as reported in Table II.A.5 of the data collection. *Id.*

[21] *Id.* In response to requests from the cable companies, the Commission permitted cable companies to include only their *middle mile* fiber facilities in responding to the data collection, given that the cable companies were already obligated to report their connection data as part of the National Broadband Plan mapping project. *See e.g.*, Letter from Steven F. Morris, Vice President and Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (Nov. 19, 2012) ("we explained that if the Commission is interested in the availability of 'best efforts' (*i.e.*, non-dedicated) broadband services offered by cable operators to business customers, it should look at the data that companies submit in connection with the National Broadband Map rather than imposing a separate, redundant collection requirement"). Accordingly, the analysis conducted by Drs. Israel, Rubinfeld, and Woroch includes fiber or DOCSIS 3.0 facilities as reported in the National Broadband Plan mapping data. Israel-Rubinfeld-Woroch Analysis, Section III.A.

[22] *Id.*, Section III.B & Table C. The way the Commission has designed the data collection has made it unnecessarily difficult to map the deployment of competitive facilities to the available demand. The Commission's approach does not permit the parties to determine how much demand is served at each connection location, because any connection that is more than one Gigabit is masked in the Data Enclave and rendered as one Gigabit. This approach has the effect

The inclusion of the Commission's cable connection data from the National Broadband Plan mapping project is necessary because cable companies have been aggressively targeting small and mid-sized special access customers for years.[23] During the comment cycle on the Commission's data collection request, the cable industry conceded that data on its deployment should be part of any analysis of the special access marketplace. "To the extent USTelecom is simply asserting that cable operators offer attractive alternatives to ILEC special access services, and that those services should be considered as part of any marketplace analysis, NCTA agrees."[24] Indeed, in responding to claims that its proposed revisions to the data collection would *understate* the level of competition offered by cable operators, NCTA asserted:

> If our goal was to understate the presence of cable operators, presumably we would have objected to the obligation to identify every single commercial building a cable operator serves, but we did not. We also would have objected to questions regarding best efforts broadband services (which USTelecom previously suggested are marketed by cable operators and purchased by customers as faster and less expensive alternatives to the special access services offered by incumbent LECs), but we did not do that either.[25]

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of making it look like there is far less demand in the urban areas where competitive deployment exists than there really is. Similarly, the data set lacks the information necessary to determine total revenues from special access services at the census block level. Drs. Israel, Rubinfeld, and Woroch have therefore used Dun & Bradstreet data on the location of business "establishments" as a proxy for the level of potential special access demand in each census block in the data collection. Israel-Rubinfeld-Woroch Analysis, Section III.A.

[23] *See, e.g.,* Sean Buckley, *Cable hones its wholesale skills in special access, wireless backhaul*, Fierce Telecom, April 7, 2015, http://www.fiercetelecom.com/special-reports/cable-hones-its-wholesale-skills-special-access-wireless-backhaul (noting that cable companies "offer lower speed tiers using a mix of DOCSIS 3.0 and DOCSIS 3.1 equipment to serve the wireline access space" and quoting analyst as saying that "it's all about having a different option for T-1s"); *see also* Letter from Glenn T. Reynolds, USTA, to Marlene H. Dortch, FCC, dated November 29, 2012 (detailing cable company offers in competition with ILEC DS1s).

[24] Reply to Oppositions of the National Cable & Telecommunications Association, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 3 (filed Jan. 8, 2014).

[25] *Id*. at 3-4. The Commission also has recognized the competitive position of cable operators in the business services market: "although many cable operators are relatively new entrants competing in the marketplace for the provision of telecommunications services to business customers, cable operators have expansive – and in some areas, ubiquitous – network facilities

Cable companies have invested billions of dollars in their networks to compete for special access customers, and they are doubling down on this business to offset slow growth in their consumer businesses.[26] Indeed, it is widely recognized that "[c]able is the fastest growing segment in the wholesale and retail business Ethernet markets."[27] As Vertical Systems Group reports, "'[t]he Cable MSO segment remained the fastest growing overall in 2014, garnering growth that considerably outpaced the Incumbent Carrier and Competitive Provider segments. . . . Already established in metro markets, leading cable companies are fortifying their Ethernet offerings to meet the needs of larger businesses with regional and nationwide networks."[28] Thus, in just the past two years, "cable operators have increased the penetration of business locations they serve by more than 50 percent while ILEC penetration dipped nearly 14 percent."[29] Comcast, which was recently named the fastest growing Ethernet provider for the

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that can be upgraded to compete in telecommunications markets at relatively low incremental cost." Order, *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators*, WC Docket No. 11-118, ¶ 28 (2012) (internal footnote citations omitted).

[26] *See, e.g.*, Gerry Smith, Comcast Targets Big Businesses to Offset Consumer TV Defections, BloombergBusiness (Sep. 16, 2015), http://www.bloomberg.com/news/articles/2015-09-16/comcast-targets-big-businesses-to-offset-consumer-tv-defections.

[27] *E.g.*, Sean Buckley, *Cable hones its wholesale skills in special access, wireless backhaul*, Fierce Telecom, April 7, 2015, http://www.fiercetelecom.com/special-reports/cable-hones-its-wholesale-skills-special-access-wireless-backhaul.

[28] Vertical Systems Group, *2014 U.S. Cable MSO Ethernet LEADERBOARD* (Mar. 16, 2015), http://www.verticalsystems.com/vsglb/2014-u-s-cable-mso-ethernet-leaderboard/.

[29] Sean Buckley, *Cable operators taking greater share of large businesses, says analyst firm*, FierceTelecom (Sep. 21, 2015), http://www.fiercetelecom.com/story/cable-operators-taking-greater-share-large-businesses-says-analyst-firm/2015-09-21.

second consecutive year, is said by analysts to be "well positioned in 2015 due to its extensive fiber network footprint."[30]

However, *even if* cable location data from the National Broadband Plan mapping project is excluded from the analysis, the connection and fiber deployment data as reported in the data collection still show near-ubiquitous deployment of sunk facilities. CLECs have deployed their own competitive facilities in the vast majority of the census blocks nationwide that contain special access demand **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**, and those census blocks cover the vast majority of special access connections **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** and most business establishments **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**.[31] To be sure, the data collection indicates, as everyone has always understood, that there are a small percentage of census blocks in which the 2013 data collection indicates no competitive network (although, as shown above, there are in fact very few census blocks with special access demand that have no facilities-based competitor). The data collection confirms, however, that these "ILEC only" census blocks contain extremely small levels of demand, both individually and in the aggregate.[32]

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[30] Comcast, The Fastest Growing Ethernet Provider, Two Years Running, Feb. 25, 2015, http://corporate.comcast.com/news-information/news-feed/the-fastest-growing-ethernet-provider-two-years-running. *See also* Carol Wilson, *Cable Looking Past AT&T*, *Verizon*, LightReading, Dec. 4, 2015, http://www.lightreading.com/cable/cable-business-services/cable-looking-past-atandt-verizon/d/d-id/719679 (quoting Time Warner Cable executive explaining that Time Warner Cable "will gain as much market share [for business services] as we have the right to win. . . . We are going to have to win customers one customer at a time. But we have the opportunity to do that").

[31] Israel-Rubinfeld-Woroch Analysis, Table F.

[32] Israel-Rubinfeld-Woroch Analysis, Section III.B.

While these data are impressive, they significantly *understate* the actual level of competitive deployment because they are from 2013 and thus more than two years old. The growth of Ethernet services has accelerated substantially over the last two years, and competitors of all types have continued to invest billions to expand the reach of their networks. One analyst has explained that "U.S. Ethernet port growth in the first half of 2015 was unprecedented, easily surpassing estimates. . . . [and that one of the p]rimary growth drivers for 2015 [is] massive migration from TDM to Ethernet services."[33] Indeed, the special access data set itself shows that competitors experienced very substantial double digit growth even during 2013.[34] Further, AT&T's internal data confirm these trends: from the end of 2013 (the period covered by the data collection through November 2015, AT&T's non-affiliate-billed revenues for TDM-based DS1 services declined very sharply.[35] If the data set collected by the Commission were updated, it would undoubtedly show even higher levels of competitive facilities.

It is no answer to say that the existence of competitive facilities in a census block does not establish that the competitor could actually serve the entire census block. To begin with, census blocks with the most special access demand have been blanketed by competitive facilities. But even in the most unlikely extreme instance where a competitor has deployed only to a small corner of a census block, that competitor would generally be able to compete for the establishments that demand special access in the rest of the census block as well. The average size of census blocks in MSAs with demand for special access services is only about one-seventh of a square mile, and most of these census blocks are actually much smaller. Indeed, about

[33] Vertical Systems Group, "Ethernet Market Share – U.S.: Mid-2015 U.S. Port Share."

[34] Israel-Rubinfeld-Woroch Analysis, Section III.C.

[35] *See* Declaration of Paul Reid ¶ 18, attached as Attachment A to the Brief of AT&T in Support of Its Direct Case, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247 (Jan. 6, 2016) ("Reid Decl.").

three-quarters of them are less than about 0.08 square miles and half are less than about 0.02 square miles.[36] Therefore, even if only a single competitor had deployed services to just one far corner of a census block with special access demand, it could still compete for customers in a large portion of the census block.[37] More fundamentally, however, competitors typically deploy facilities in areas within census blocks where there is special access demand, and special access demand tends to be concentrated in business districts. As a result, competitive facilities deployed in a census block will tend to be very close to the vast majority of locations with demand in that census block. And, in all events, there are often multiple competitors within census blocks allowing them to compete for customers throughout all or most of the census block.

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[36] *See* Israel-Rubinfeld-Woroch Analysis, Section II.B.

[37] For example, in the 2006 Consent Decrees regarding the AT&T/SBC and Verizon/MCI mergers, the DOJ found that competitive harm occurred "in situations where only AT&T and SBC or MCI and Verizon, respectively, were capable of supplying special access to a particular building before the merger and no other CLEC was likely to connect the building to its network. *AT&T Inc. and BellSouth Corp.—Application For Transfer of Control*, 22 FCC Rcd. 5662, ¶¶ 42-49 (2007) ("*AT&T/BellSouth Merger Order*") (quoting Decl. of W. Robert Majure at 14, *United States v. SBC Communications, Inc. and AT&T*, Civil Action No. 1:05CV02103 (D.D.C. 2006) (public redacted version) ("Majure Decl.")). To determine those buildings served by DS-3s where CLEC entry was likely (and therefore likely to prevent anticompetitive effects), the DOJ used a "demand/distance screen" which found no likelihood of anticompetitive harm where the distance was 0.1 mile and the minimum demand was 2 DS3s. Majure Decl. at 9-11 & n.17. In the *AT&T/BellSouth Merger Order*, the Commission described the DOJ's "screening" process with approval and found that the use of screens by AT&T and BellSouth, in evaluating the effect of their merger on horizontal competition for "Type 1" special access, was "for the most part, both reasonable and consistent with the approach the DOJ adopted." *AT&T/BellSouth Merger Order* ¶¶ 42-49; *see also* Report and Order and Further Notice of Proposed Rulemaking, *Special Access for Price Cap Local Exchange Carriers*, 27 FCC 16318, ¶ 78 n.173 (2012).

II. THE COMMISSION SHOULD RETAIN EXISTING PHASE II RELIEF, EXTEND PHASE II RELIEF TO ADDITIONAL MSAs, AND MODIFY THE TRIGGERS TO ADDRESS THE UNDER-INCLUSIVENESS OF THE ORIGINAL TRIGGERS.

The unequivocal evidence of nearly ubiquitous competitive deployment wherever special access demand exists leads to three inescapable conclusions with respect to the Commission's pricing flexibility regime moving forward. First, there is no basis to revisit any grant of Phase II relief and therefore the Commission should reaffirm all existing grants of Phase II relief and reject calls for the re-imposition of price caps anywhere they have been lifted. Second, the Commission should both (i) immediately, in this rulemaking proceeding, extend Phase II relief to additional MSAs, such as Chicago and Atlanta, that the data collection confirms exhibit ubiquitous competitive deployment, and (ii) modify or supplement the triggers to ensure that other MSAs (or, alternatively, subsets of MSAs) that exhibit extensive competitive deployment can also win Phase II relief in future petitions. Third, if the Commission does go down the path of replacing its MSA-based approach with a more geographically granular approach, it may not re-regulate some areas without also extending Phase II relief at the same level of granularity to areas that are currently subject to price cap or Phase I regulation, but where, the data collection shows competitors have deployed sunk facilities such that competition for special access service exists.

A. The Data Collection Confirms That There Is No Basis to Revisit Any Grant of Phase II Relief or "Re-Impose" Price Cap Regulation in Phase II MSAs.

The data confirm that there are no grounds to revisit any grant of Phase II pricing flexibility. First, looking at the correct measures, which as discussed above include cable connections as reported in the National Broadband Plan mapping project, competitors have deployed their own facilities in most of the census blocks in Phase II MSAs containing special access demand **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY**

CONFIDENTIAL], and those census blocks in turn account for most special access connections **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** and most business establishments **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**.[38] But even if the cable connection data is excluded and only the CLEC data and cable fiber data from the 2013 data collection itself are considered, competitors have still deployed their own facilities in the vast majority of census blocks with special access demand **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] [redacted] **[END HIGHLY CONFIDENTIAL]**, accounting for the overwhelming portion of special access connections **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** and business establishments **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**.[39]

The data thus affirmatively refute CLEC claims that the Commission has over-extended Phase II relief by granting such relief on an MSA-basis. As Drs. Israel, Rubinfeld, and Woroch explain, for several reasons, there is no cause for concern even with respect to the small number of census blocks in Phase II MSAs in which the data collection does not document the existence of an ILEC competitor.

First, those census blocks contain very little demand. Under the Commission's current MSA-based system, most **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of the census blocks in Phase II MSAs are served by at least one facilities-based competitor.[40] And because demand for special access service tends to be geographically concentrated, competitor facilities are able to serve virtually all of the business

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[38] *See* Israel-Rubinfeld-Woroch Analysis, Table C-PF2.

[39] *See id.*, Table F-PF2.

[40] *See id.*, Section III.C & Table C-PF2.

establishments **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** in Phase II MSAs.[41] Accordingly, if the Commission were to attempt to address the supposed "overbreadth" of the current MSA-based triggers, it would at most be considering the re-imposition of price cap regulation in a smattering of census blocks (or other geographic sub-units) in the outlying areas of Phase II MSAs, which together serve a minuscule portion **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of total potential special access demand.[42] That would make absolutely no sense whatsoever; the Commission would be re-imposing price caps on empty air. There is no economic or practical justification for creating, initializing, and maintaining a new system of price caps on these demand-empty census blocks on the outskirts of existing Phase II MSAs.

Moreover, there is no real risk that the small number of customers in outlying parts of the Phase II MSAs suffer competitive harm because *ILECs generally do not charge different rates for special access services at different locations within an MSA.* Even where pricing flexibility is granted, ILECs remain subject to tariffing requirements that enable all similarly situated consumers in the MSA to take advantage of the prices and contract terms determined in the competitive areas.[43] As the Commission has stated, "to the extent that an incumbent LEC attempts to use contract tariffs in an exclusionary manner by targeting them to specific customers, the Commission will enforce the requirement that they make contract tariffs available to all similarly situated customers."[44] Given that the vast majority of demand in these Phase II MSAs is subject to intense competition, customers in outlying areas are actually getting the

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[41] *See id.*

[42] *See id.*, Table C-PF2.

[43] *See Pricing Flexibility Order* ¶ 130.

[44] *Id.*; *see also WorldCom*, 238 F.3d at 460 (upholding the *Pricing Flexibility Order* based, in part, on the continuation of tariff filing requirements for LECs that receive Phase II relief).

benefit of the competitively determined prices in those MSAs.[45] In fact, that would be the case even if the percent of customers located in areas served by one or more CLECs was substantially lower.

Replacing the existing MSA-based approach with a more granular approach would also run counter to the important administrative considerations the Commission has recognized. As the Commission explained in the *Pricing Flexibility Order*, choosing a geographic basis for evaluating requests for pricing flexibility requires a careful balance. On the one hand, the area must be small enough so that the competitive conditions within it are reasonably uniform, but also large enough to be "administratively workable."[46] Even accepting *arguendo* claims that using a smaller geographic basis would theoretically achieve some incremental improvement in accuracy, that benefit must be balanced against the additional administrative costs or other harms of such an approach. The Commission carefully considered these factors in the *Pricing Flexibility Order*, and determined that MSA-based relief struck the best balance between assuring accuracy and minimizing the administrative burdens on the Commission and the parties.[47] That remains true today, and indeed, it is all the more true given the fact that the TDM services that the Commission would be re-regulating are experiencing a steep decline toward extinction. As the Commission is well aware, the market for special access services is undergoing a sea change, as customers are rapidly abandoning legacy TDM technologies for

[45] In addition, there is no basis in either the data collection or economic theory to conclude that ILECs could "leverage" any "market power" in these outlying areas that lack demand into the areas where the great majority of the demand is served by dozens of facilities-based competitors. *See* Declaration of Dennis Carlton, Mark Israel, Allan Shampine, and Hal Sider, ¶¶ 74-75, attached as Attachment C to the Brief of AT&T in Support of Its Direct Case, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247 (Jan. 6, 2016).

[46] *Pricing Flexibility Order* ¶ 71.

[47] *Id.* ¶¶ 71-76.

Ethernet services.[48] Although the Commission has not collected data concerning this transition, AT&T's own experience is that it is rapid and irreversible. For example, between January 2013 and October 2015, AT&T's non-affiliate-billed revenues for TDM-based DS1 services declined very sharply,[49] and AT&T plans to retire its copper TDM network used to provide DS1 service early in the next decade. TDM-based services are thus rapidly headed for extinction. Under these circumstances, resuscitating and reinventing a regulatory regime specifically to address areas with minimal or no special access demand would make even less sense. But it wouldn't be merely futile: the only thing that will slow down the transition away from TDM services to broadband services would be regulations that give customers artificial incentives to delay the transition. Re-regulating TDM special access services, particularly in the face of the data the Commission has collected and cited herein would thus run counter to the Commission's broadband goals.

Beyond all this, re-imposition of price caps in these areas would require the Commission to surmount a host of legal hurdles. In order to invoke its authority to regulate competition and to impose new rate regulation under Sections 201 and 202, the Commission would have to clearly demonstrate that there is a market failure that requires a regulatory solution.[50] That

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[48] *See, e.g.*, Vertical Systems Group, Ethernet Market Share – U.S.: Mid-2015 U.S. Port Share" ("U.S. Ethernet port growth in the first half of 2015 was unprecedented, easily surpassing estimates. . . . [One of the p]rimary growth drivers for 2015 [is] massive migration from TDM to Ethernet services.").

[49] *See* Reid Decl. ¶¶ 18, 37.

[50] *See, e.g.*, Tentative Decision and Request for Further Comments, *Amendment of 47 C.F.R. § 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules*, 94 FCC 2d 1019, ¶ 107 (1983) (acknowledging that the Commission "should not intervene in the market except where there is evidence of a market failure and a regulatory solution is available that is likely to improve the net welfare of the consuming public, *i.e.*, does not impose greater costs than the evil it is intended to remedy"); Memorandum Opinion and Order, *Orloff* v. *Vodafone Airtouch Licenses LLC*, 17 FCC Rcd. 8987, ¶ 22 n.69 (2002) (absent a marketplace failure the Commission generally "rel[ies] on market forces, rather than regulation"); Second Report and

would require the Commission to make an affirmative showing that the ILECs' current rates are unjust and unreasonable – *i.e.*, completely outside the zone of reasonableness – whether price caps technically constitute a prescription or not. Indeed, the Commission has acknowledged that even to impose interim special access rate prescriptions, the "record would have to support the conclusion that *every* . . . rate [and practice for] *every* service for which pricing flexibility [or forbearance] has been granted violates Section 201."[51] For the reasons just discussed, the Commission could not make any such predicate findings for these services. But even if the Commission could survive that hurdle, it would still face the daunting task of figuring out how to reinvent and implement a price cap regime. When the Commission originally adopted price caps in 1990, it set the caps at the level of the then-existing rates, which had been determined in an old-fashioned rate-of-return proceeding.[52] The services at issue here thus have not been subject to any rate regulation for many years – in the case of some DSn services, almost 15 years. The Commission thus would have no defensible basis for initializing price cap rates at a different level than current rates. Nor does the Commission have any record basis upon which to address other issues, such as exogenous cost adjustments, and past experience in that area makes clear this would take years (at best) to solve that dilemma, at which point TDM services would be even more archaic.

Order, *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd. 1411, ¶ 173 (1994) ("[I]n a competitive market, market forces are generally sufficient to ensure the lawfulness of . . . terms and conditions of service set by carriers who lack market power"); *Cellco P'ship* v. *FCC*, 357 F.3d 88, 96 (D.C. Cir. 2004) (the Commission may adopt regulations only "upon finding that they advance a legitimate regulatory objective").

[51] Brief for Federal Communications Commission, *In re AT&T Corp., et al.*, No. 03-1397, 2004 WL 1895955, at *23-24 (D.C. Cir. filed Aug. 23, 2004) (emphasis in original).

[52] *See National Rural Telecom Ass'n* v. *FCC*, 988 F.2d 174, 178 (1993).

B. The Data Collection Requires the Commission Both to Extend Phase II Relief Immediately to Additional MSAs and to Modify the Triggers to Ensure That Other Areas with Competitive Facilities Obtain Regulatory Relief.

The data collected by the Commission demonstrates not only that there is no need to roll back Phase II pricing flexibility, but, to the contrary, that the existing pricing flexibility triggers are too conservative. Competition is flourishing throughout numerous areas that have not qualified for Phase II relief under the existing triggers, including large cities such as Chicago and Atlanta – omissions that on their face should raise a gigantic red flag that the triggers are too conservative. Indeed, while CLECs have peddled the theory that outlying areas of an MSA where there is little or no special access demand at all should dictate special access regulatory policy – a "tail wags the dog" theory if ever there were one – the real story is the triggers are overly conservative because they fail to consider substantial and growing competition that exists independent of any need for collocation at an ILEC wire center. And so, instead of marching backwards to the early 1990s, as the CLECs would prefer, the Commission needs to take steps to expand pricing flexibility and liberalize its triggers in recognition of the fact that the existing rules are too restrictive. Specifically, the Commission should: (i) immediately extend Phase II relief to those MSAs, which the data confirms have competitive deployment, and (ii) modify the triggers to ensure that, going forward, ILECs can gain additional pricing flexibility in other, similar MSAs. This modification can be effected either by lowering the existing collocation threshold requirements or by supplementing the existing test with an alternative, additional path by which ILECs can obtain more granular relief.

Immediate Phase II Relief for Certain MSAs. The data confirm that the Commission should immediately extend Phase II relief to numerous other MSAs that are currently subject to only Phase I or no pricing flexibility. One of the anomalies of the Commission's 1999 pricing flexibility rules was that the triggers made it unintentionally difficult to obtain Phase II relief for channel terminations in larger cities that have the most competition (such as Chicago in AT&T's service territory). This perverse result was a consequence of the Commission's conservative reliance on the evidentiary proxy of facilities-based collocations coupled with the insistence that an ILEC demonstrate the existence of such collocations in an extraordinarily high percentage of wire centers in these geographically large MSAs to obtain Phase II relief for channel terminations. Competitors in the largest cities have built the largest and most extensive networks, and thus are more likely to rely on end-to-end facilities-based alternatives without the need for ILEC collocation (and, as discussed above, cable competitors rarely use ILEC collocations either). This has resulted in manifestly incorrect results, with cities like Chicago still subject only to Phase I relief for channel terminations.

For purposes of an immediate recalibration in this rulemaking proceeding, however, the Commission has before it a comprehensive data set that obviates the need for such overly conservative proxies. Based on those data, the Commission should dramatically expand the number of MSAs with Phase II pricing flexibility. As Drs. Israel, Rubinfeld, and Woroch demonstrate, competitors have deployed competing facilities to virtually all of the census blocks in MSAs with Phase I pricing flexibility nationwide **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**, and those census blocks account for nearly all special access connections **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** and business establishments **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**.[53] Indeed, competitive facilities exist throughout MSAs that have received no pricing flexibility at all, as competitive facilities exist in most of the census blocks in those MSAs **[BEGIN HIGHLY**

[53] Israel-Rubinfeld-Woroch Analysis, Table C-PF1.

CONFIDENTIAL] [redacted] **[END HIGHLY CONFIDENTIAL]**, accounting for most **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** special access connections and business establishments **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**.[54]

The Chicago MSA illustrates this point. The Chicago MSA has only Phase I pricing flexibility for channel terminations. Yet, almost every business establishment **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** in Chicago – *i.e.*, locations that might have demand for special access services – are located in census blocks where there is at least one other competitor that has deployed competitive facilities.[55] Even a number of smaller MSAs, such as the Dayton, Ohio MSA, which have not received any pricing flexibility for channel terminations, should immediately be given Phase II pricing flexibility relief based on the substantial competition shown in the 2013 data set. In Dayton, for example, almost all **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** business establishments that might have demand for special access services are located in census blocks where at least one other competitor has deployed competing facilities.[56]

There is no rational basis for retaining price cap regulation in these MSAs, nor is there any reason to fall back on proxies when the Commission has actual data about competitive deployment before it.[57] Accordingly, the Commission should implement a one-time reset in this

[54] *Id.*, Table C-PC.

[55] *See id.*, Table C-MSA.

[56] *See id.*, Table C-MSA.

[57] *See, e.g.*, *State Farm*, 463 U.S. at 43 (to engage in reasoned decisionmaking, an agency "must examine relevant data"); *Butte County*, 613 F.3d at 194 ("an agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of

rulemaking proceeding, based on the 2013 data collection, that extends Phase II relief to any MSA in which the data collection shows that substantial competitive sunk facilities have been deployed.

Modification of the Triggers in the Commission's Rules. The data also require the Commission to lift the freeze and liberalize its triggers for Phase II relief going forward. Even after the Commission recalibrates pricing flexibility relief based on the 2013 data before it, there will be a need for a mechanism to assess when and where future pricing flexibility must be provided. The Commission will have to rely on proxies to make those calls because it is not going to have the benefit of comprehensive actual data. But it is now evident that the existing proxies are too conservative. In fact, as cable companies continue to make rapid inroads in the enterprise space, the existing triggers will grow even more inadequate.

Because the Commission has the benefit of actual data on competitive facilities, it should use that data to adjust the triggers themselves to address this problem of under-inclusiveness. AT&T is not in a position at this time to recommend any particular adjustment because it has not had sufficient time to test alternative triggers against the data to determine an alternative trigger that most appropriately addresses this problem of under-inclusivity. But any such change should either relax the collocation requirements and/or establish an alternative, additional path by which ILECs may gain Phase II relief in geographically smaller areas (such as downtown areas and other business districts), if such geographically granular relief can be practicably administered and implemented without unnecessary cost or complexity that is confusing for ILECs or their customers.

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§ 706"); *Comcast*, 579 F.3d at 7 (vacating Commission rule that capped the market share of any single cable television operator at 30% of subscribers because the Commission "fail[ed] to consider the impact of [direct broadcast satellite] companies' growing market share" and "the growth of fiber optic companies").

C. If the Commission Attempts to Roll Back Pricing Flexibility In Any Area, It Must Also Extend Phase II Relief to the Geographically Granular Areas Where the Data Collection Shows There Is Competitive Deployment.

AT&T is skeptical of proposals to scrap MSA-based relief altogether because the data shows that competition is ubiquitous in virtually all areas where there is special access demand. Thus, to the extent there are census blocks within an MSA that has been granted Phase II relief where competition is lacking, the data demonstrates that there is little or no special access demand in those areas. That is the true value of this data collection: whereas CLECs have constantly talked about the outlying areas of Phase II MSAs, what we now know is that, if there are no competitive facilities in those areas, it is of no concern because neither is there any special access demand. And, while a more granular set of triggers would thus seem to offer little benefit, it could add significantly to the cost and complexity of any regulatory regime.

Nonetheless, *if* the Commission were to start down the path of using a more granular geographic basis for determining where to grant pricing flexibility—and especially if it seeks to re-impose price cap regulation in the outlying areas of Phase II MSAs—it would be patently arbitrary not to extend Phase II relief at the same level of granularity to non-Phase II areas where the data shows that competitors have deployed sunk facilities.

Both the Commission and the D.C. Circuit have recognized that there is no legal or economic justification for retaining price cap regulation in a geographic area where competitors have deployed sunk facilities capable of providing service to that area.[58] Here, the data

[58] *See, e.g.*, *Pricing Flexibility Order* ¶ 80 ("Once multiple rivals have entered the market and cannot be driven out, rules to prevent exclusionary pricing behavior are no longer necessary. . . . If a competitive LEC has made a substantial sunk investment in equipment, that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market."); *WorldCom*, 238 F.3d at 458-59 ("the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed," because "that equipment remains available and capable of providing service in competition with the incumbent, even if

unequivocally show that even in 2013, competitors had deployed sunk facilities in census blocks serving the majority of special access demand in a significant number of MSAs that have received limited or no pricing flexibility.[59] Thus if the Commission switches to a more granular geographic area (such as census blocks) for the purpose of re-regulating the outlying areas of current Phase II MSAs, where little demand exists, it must also extend Phase II relief, on a similarly granular basis, to areas within the non-Phase II MSAs that have facilities-based competition. Any other approach would be arbitrary, especially given that the census blocks with facilities-based competition that remain under price caps contain much more of the available demand than the outlying Phase II census blocks where the data collection suggests that only the ILEC is available.[60]

CONCLUSION

For the foregoing reasons, the Commission should reaffirm Phase II relief in each MSA where it has been granted, extend Phase II relief to additional MSAs, and modify the rules to expand Phase II relief as described above.

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the incumbent succeeds in driving that competitor from the market"). *See also Pricing Flexibility Order* ¶ 155 (recognizing that special access customers are "sophisticated purchasers of telecommunications services, fully capable of finding competitive alternatives where they exist and determining which competitor can best meet their needs").

[59] Israel-Rubinfeld-Woroch Analysis, Tables C-PF1, F-PF1, C-PC, F-PC.

[60] *See Dist. Hosp. Partners, L.P.* v. *Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015) ("We have often declined to affirm an agency decision if there are unexplained inconsistencies in the final rule" (citing cases)); *Nat'l Parks Conservation Ass'n* v. *EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015) (agency actions must "be consistent; an internally inconsistent analysis is arbitrary and capricious"); *General Chemical Corp.* v. *United States*, 817 F.2d 844, 854 (D.C. Cir. 1987) (vacating agency action in part because agency failed to treat evidence of market competition "in a rational and consistent manner that is fair to the parties involved"); *see also Leather Industries of America, Inc.* v. *EPA*, 40 F.3d 392, 401 n.4 (D.C. Cir. 1994) (overturning agency action because agency did not have "blanket one-way ratchet authority to tighten standards").

Respectfully submitted,

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