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Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: Notice of Written Ex Parte Communication, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98 and 98-147

Dear Ms. Dortch:

AT&T, the largest purchaser of special access services and also one of the largest facilities-based providers of local services, responds here to the incumbent LECs' (and especially the RBOCs') urgings that the Commission retain the current "interim" use and commingling restrictions on combinations of loop and transport unbundled network elements ("UNEs") in its forthcoming rules in the Triennial Review.¹ AT&T here demonstrates four key points. *First*, there is no legitimate argument that competitors are not impaired in their ability to compete without access to high capacity loop and transport UNEs, except in very limited circumstances. *Second*, the Commission's concerns in adopting the interim restrictions are fully resolved. Indeed, the RBOCs themselves have abandoned their arguments regarding their possible effects on universal service. *Third*, the changed market conditions since the initial adoption of the interim use and commingling restrictions mean that a decision to retain them will enable ILECs to use their extensive market power over "last mile" loop and transport facilities to remonopolize the highly competitive long distance market -- especially if the Commission does not grant AT&T's petition to re-regulate the RBOCs' excessive special access rates.² This is a critical

¹ See, e.g., Bell South Reply Comments at 39-41; SBC Reply Comments at 157-63; *ex parte* letter from William P. Barr, Verizon, dated December 17, 2002 ("Barr Letter").

² Petition for Rulemaking of AT&T Corp., RM-10593, at 8 (filed Oct. 15, 2002) ("AT&T Special Access Petition").

competitive fact that the incumbents completely ignore. *Fourth*, continued imposition of the restrictions will significantly impede the Commission's goal of encouraging competitive carriers to construct additional facilities.

Given these circumstances, it would be inconsistent with the Act's text and purpose to allow ILECs to impose any use or commingling restrictions on competitors' use of UNE combinations to provide any telecommunications service, including services that are offered today as "special access," *i.e.*, dedicated facilities that provide connections between two specific locations. Moreover, given the prolonged period during which requesting carriers have been denied the opportunity to access such functionalities as UNEs – including the period since late 1999, when the "temporary" use and commingling restrictions were imposed -- the Commission should relieve requesting carriers of onerous and inappropriate termination liabilities in ILEC tariffs or contracts that would prevent requesting carriers from finally being able to use loop-transport combinations as UNEs in lieu of functionalities they have previously been forced to purchase as special access services.

Use and Commingling Restrictions are Anticompetitive and Discriminatory and Should be Entirely Eliminated.

The RBOCs' argument in support of continuing the "interim" use and commingling restrictions is that (a) some competitors have built some competitive facilities in some cases; (b) in light of such construction, the RBOCs have received pricing flexibility relief, which indicates that the market for such facilities is competitive; and (c) there are material differences between the local and interLATA markets that make the impairment analysis relating to the unbundling of UNE combinations for purposes of providing special access services different from the analysis regarding local services. These arguments are patently inadequate to support the sweeping relief the incumbents seek. In fact, the real reason for the RBOCs' campaign to retain these restrictions is that if requesting carriers are permitted to use UNE combinations instead of special access services, the incumbents will have to surrender the huge and growing monopoly profits they have been earning on those services.³

Contrary to the RBOCs' claims, the record clearly demonstrates that other carriers are materially impaired in their ability to buy or build alternatives to incumbent LEC loop and transport facilities at costs comparable to the incumbents'. In addition, the RBOCs' legal efforts to block requesting carriers from obtaining "new combinations" of unbundled network elements have now been totally rebuffed by the Supreme Court. Thus, there can be no question that requesting carriers may order "new" combinations of loop and transport UNEs to provide telecommunications services. It is also settled that requesting carriers may purchase individual loop or transport UNEs to provide exchange access services.

³ *Id.* at 10 (showing that RBOCs earned more than \$5 billion in excess profits in 2001 alone).

Consequently, the only issue that needs resolution here is requesting carriers' ability to convert existing special access arrangements to combinations of loop and transport UNEs and associated multiplexing at TELRIC rates, so that they are no longer forced to purchase them at excessive special access rates. In that regard, years of actual market experience now confirm that the "interim" use and commingling restrictions set out in the *Supplemental Order Clarification* (and the associated "safe harbor" provisions that implement them) have severely impaired requesting carriers' ability to convert special access arrangements to UNE combinations, even when they are used to provide a significant amount of local service. It is also clear these restrictions significantly impede competitors' ability to construct their own facilities networks.

Finally, and most ominously, the continuing grants of RBOC § 271 applications have made the anticompetitive market impacts of the use and commingling restrictions significantly greater now than in 1999. Making those restrictions permanent would allow the RBOCs to leverage their monopoly power over facilities that are necessary to originate and terminate interexchange communications to remonopolize the extremely competitive interexchange market. Therefore, it is critical that the Commission promptly eliminate all such restrictions, so that all carriers can operate on a comparable economic basis in competing for all customers' business, including the business of large "enterprise" customers served by digital facilities. And in order to make the elimination of these restrictions meaningful, the Commission must also provide carriers with appropriate relief from anticompetitive contract and tariff provisions that unfairly and unreasonably punish carriers that convert special access arrangements to UNE combinations.

Impairment - The record is replete with data showing that, in the vast majority of cases, requesting carriers have no alternative to ILEC facilities to provide connectivity to end users.⁴ Thus, except in very limited instances, requesting carriers are materially impaired in their ability to buy or build alternatives to ILEC loops and transport facilities and the associated multiplexing necessary to build efficient competitive facilities. Those exceptions occur only (a) where a true competitive market with multiple participants that are able to compete away the ILECs' market power (and significantly above-cost prices) has actually developed;⁵ or (b) where both economic and practical considerations combine to make it possible for a requesting carrier to construct its own facilities at a cost that is comparable to the incumbents' own efficient costs. In the latter regard, AT&T has provided the Commission with detailed *engineering, economic, operational and marketing* data, that show requesting carriers have only limited opportunities to construct their own high capacity loop and transport facilities.⁶ And even where a carrier may have sufficient

⁴ See, e.g., Reply Comments of AT&T at 179-87, 257-68; Reply Comments of Sprint at 26-31, 34-36; Reply Comments of WorldCom at 64-71, 122-34; Reply Comments of XO at 19-22; *ex parte* letter from Thomas Jones, representing Allegiance, dated December 12, 2002 (Allegiance 12/12 *ex parte*) at 14.

⁵ See, e.g., joint *ex parte* letters from ALTS and CompTel dated October 8 and October 28, 2002 (ALTS/CompTel *ex partes*); Allegiance 12/12 *ex parte* at 15-28.

⁶ See, e.g., *ex parte* letter from Joan Marsh, AT&T, dated November 25, 2002 (AT&T 11/25 *ex parte*). This demonstration clearly provides a firm factual framework that focuses

traffic volumes to warrant construction of its own facilities, in order for it to be able to compete in real time, the carrier must also be able to use UNEs until it can complete its construction.⁷

The RBOCs have not offered a shred of evidence to counter these detailed factual showings. All they have offered are general statements that in *some* places *some* competitors have been able to provide *some* alternative facilities out of *some* local serving offices, and that as a result they have been able to obtain pricing flexibility under the Commission's rules.⁸ Critically, however, the RBOCs fail to respond to the fact that -- as AT&T showed⁹ -- the Commission has *expressly* and *repeatedly* found that the criteria for granting even Phase II pricing flexibility do not "describe market conditions where requesting carriers would not be impaired without access to unbundled transport."¹⁰ Indeed, the RBOCs completely ignore that the purpose of the collocation test of the *Pricing Flexibility Order* was to create an administratively simple, bright-line rule to give

directly on CLECs' "ability to provide . . . service" (see Barr Letter Attachment at 7, quoting *CompTel v. FCC*, 309 F.3d 8, 13 (D.C. Cir. 2002)). Clearly, such "ability" means more than that some competitors have constructed facilities. It also means that such facilities must be economically sustainable. See discussion below.

It is also noteworthy that AT&T's economic impairment analysis for interoffice transport (AT&T 11/25 *ex parte*, Attachment A at 7) uses an exceedingly conservative economic crossover point for assessing whether a requesting carrier should be required to build its own facilities, *i.e.*, the cost of comparable special access facilities. In a truly efficient market, competitors are impaired if they must incur significantly higher input costs than a competitor. See *ex parte* letter from C. Frederick Beckner III, representing AT&T, dated November 14, 2002, (attaching Robert D. Willig, *Determining Impairment Using the Horizontal Merger Guidelines' Entry Analysis*). Thus, the economically "correct" crossover point would be the ILEC's substantially *lower* TELRIC costs for such facilities -- especially since the RBOCs have been granted special access pricing flexibility in many areas and can lower their prices to retail customers to reflect their actual costs instead of their grossly inflated special access rates. However, since AT&T did not have ready access to such costs, it used the much *higher* special access rates for such facilities in the analysis. In doing so, however, AT&T's analysis also provides another view of the "make/buy" decision, *i.e.*, the breakeven point between AT&T's costs and the revenues it could expect to earn for the use of such facilities. Because ILEC special access rates also represent the price that AT&T could expect to charge a retail customer for the same functionality, the analysis also provides a conservative breakeven analysis on that scale as well, because it ignores all of AT&T's other costs in selling, providing and maintaining those services.

⁷ AT&T Reply Comments, Willig Reply Dec. ¶¶ 37-39.

⁸ See, e.g., Barr Letter at 1 and Attachment at 1-3.

⁹ AT&T Reply Comments at 273-74.

¹⁰ *UNE Remand Order* ¶ 341 n.673.

ILECs the flexibility to adjust their special access prices to respond to *nascent* competitors at an early stage of competitive entry.¹¹ They further ignore that the Commission also found, notwithstanding the RBOCs' assertions that the special access market is competitive, that the ILECs *retain* market power even *after* they satisfy the pricing flexibility triggers.¹² Thus, despite the RBOCs' claims, the *Pricing Flexibility Order* not only fails to support their argument, but it also flatly refutes it.¹³

It is also critical to recognize that any review of whether a particular element has been "significantly deployed on a competitive basis"¹⁴ only makes economic sense if the competitive facility has been deployed *profitably* and that such deployments have been sufficient to restrain the incumbent monopolists' market power. But the RBOCs themselves have made much of the fact that many competitive facilities were so *unprofitable* that the competitors that built them either went bankrupt or dissolved entirely.¹⁵ Thus, the controlling fact cannot be the mere presence of competitive facilities. Instead, the Commission must determine whether such facilities can be operated profitably, so they can be viable over the long term.¹⁶ Moreover, as shown above, it is clear from the Commission's findings in the *Pricing Flexibility Order* that there is simply no evidence that the incumbents lack market power over the network elements at issue.

¹¹ *Pricing Flexibility Order* ¶¶ 84, 90.

¹² *Pricing Flexibility Order* ¶¶ 90, 151. *See also* New York State Department of Public Service Comments at 5 (noting that the NYPSC has found that Verizon retains market power in the provision of dedicated facilities even in New York City).

¹³ There is also no basis for any assertion that *any* court has held that an impairment test must determine whether a functional equivalent "is otherwise available . . . from the *incumbent*" (Barr Letter Attachment at 2 (emphasis added)). Indeed, that issue was resolved long ago, in the 8th Circuit's review of the initial *Local Competition Order*, and the Commission itself has recognized that the ILECs' argument that wholesale services can take the place of UNEs "would yield absurd results." *See* AT&T Comments at 38-39, *citing Iowa Utilities Board v. FCC*, 120 F.3d 753, 809 (1997) and the Commission's July 1, 2001 brief to the D.C. Circuit in the appeal of the *UNE Remand Order*. *See also Verizon Communications Inc. v. FCC* (Sup. Ct. 2002), slip op. at 22 (noting that the Court affirmed the 8th Circuit's decision upholding the FCC's understanding that the Act "imposed no facilities-ownership requirement" as a condition of obtaining access to UNEs).

¹⁴ Barr Letter Attachment at 2, *citing USTA v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002).

¹⁵ *E.g.*, SBC Reply Comments at 1. SBC's Reply begins with the statement, "The telecommunications industry is plagued by . . . frequent bankruptcies."

¹⁶ *See UNE Remand Order* ¶ 256.

Just as important, the RBOCs offer no information regarding the specific *routes* (as opposed to individual offices) where they claim that effective competition exists.¹⁷ And the RBOCs also offer no evidence that the competitive facilities that actually exist are available at rates that approach their economic (*i.e.*, TELRIC) cost. Thus, the overwhelming record evidence shows that both loops and transport should be made generally available as unbundled network elements at TELRIC prices, subject only to the limited exceptions identified by AT&T and other competitors.¹⁸ And given the peculiarly local characteristics of the factors necessary to determine whether real competition exists, or that an individual carrier has sufficient demand to warrant construction of its own facilities, the only reasonable way to make the necessary location-specific determinations is to have State commissions conduct the review.

Access to “new” combinations - After years of legal wrangling, the Supreme Court finally rejected the ILECs’ baseless claim that requesting carriers are not entitled to order “new” combinations of unbundled network elements, especially when such combinations are routinely used by the incumbent itself to provide similar services to its affiliates or to retail customers.¹⁹ This puts to rest the issue of whether requesting carriers may obtain “new combinations” of loop and transport elements to provide telecommunications services, including special access services.

¹⁷ Verizon suggests (Barr Letter Attachment at 8) that the Commission should adopt a rule that would de-list UNEs when there are two or more fiber-based collocators in a central office. But as the record shows (*e.g.*, ALTS/CompTel *ex partes*; Allegiance 12/12 *ex parte* at 15-28), identifying the presence of a facilities-based competitor on only *one end* of a dedicated facility does nothing to demonstrate that there are actual competitive facilities on the actual route that a competitors needs. However, contrary to its claim that the application of a wire center by wire center analysis is unworkable (Barr Letter Attachment at 3), Verizon’s own proposal necessarily recognizes that it would be both feasible and appropriate to look at the competitive situation in particular offices. And although Verizon’s proposal to rely on the presence of only two competitors would not reasonably assure that there is sufficient competition to eliminate the incumbent’s market power, CLECs agree that it would be reasonable to find that (in the absence of operational factors that would impede competition) the market is reasonably competitive if there are four such alternatives for the desired route at the desired capacity levels. *See* ALTS/CompTel *ex partes*; AT&T 12/18 *ex parte*.

¹⁸ *See* ALTS/CompTel *ex partes* (proposing and discussing proposed rule for delisting transport); *ex parte* letter from Joan Marsh, AT&T, dated December 18, 2002 (submitting proposed rules regarding the delisting of transport and loops based on the analysis in the AT&T 11/25 *ex parte*).

¹⁹ *Verizon*, slip op. at 66 (“[reinstated r]ule 315(c), to the extent that it raises a duty to combine what is ‘ordinarily combined’ neatly complements the facially similar Rule 315(b) [previously] upheld in *Iowa Utilities Board*”) (citations omitted).

The Commission also held in the *UNE Remand Order*²⁰ that requesting carriers may use individual network elements that are *not* purchased in combination, *i.e.*, standalone loops and standalone transport, to provide any telecommunications service. That portion of the order was not modified on appeal. Therefore, there is no basis now to reverse that holding, or to deny requesting carriers access to those individual UNEs for use in providing any telecommunications service wherever they are impaired without access to loops or transport UNEs.

The “interim” use restrictions – In the *UNE Remand Order* and the follow-on *Supplemental Order*, the Commission reserved decision on whether requesting carriers may convert preexisting combinations of network elements purchased as special access services to UNE combinations purchased at TELRIC-based prices if such combinations are used solely to provide exchange access services. Acknowledging that this was an important issue, the Commission promised to resolve it by June 2000.²¹ However, the Commission did not decide the issue at that time, and it still remains undecided today, two and a half years later. Instead of resolving the issue, the Commission issued the *Supplemental Order Clarification*, which sought additional information and extended, on a “temporary”²² and “interim” basis, use and commingling restrictions on carriers’ ability to convert special access arrangements to UNEs if they are not used to provide a “significant” amount of local exchange service.

The Commission’s concerns at that time were twofold. First, it wanted to assure that the impairment analysis it had applied to loops and transport for purposes of local services also applied to special access.²³ Second, it cited ILEC concerns that applying UNE rates to loop-transport conversions would have detrimental impacts on universal service.²⁴ The record now shows that neither of the Commission’s stated concerns has any merit.

Despite the RBOCs’ efforts to argue otherwise, there is simply no basis to argue that the Commission’s impairment analysis regarding loops and transport can legitimately be any different for special access than for local services. It is undisputed that identical facilities are used to provide both services. Indeed, there would be no reason for the current dispute if they were different. There is also no basis to argue that the practical

²⁰ *UNE Remand Order* ¶¶ 487-88.

²¹ *Supplemental Order* ¶ 2.

²² *Supplemental Order Clarification* ¶ 1 (“we extend the *temporary* constraint identified in the *Supplemental Order* while we compile an adequate record for addressing the legal and policy disputes presented here”) (emphasis added). Accordingly, it is simply a distortion to assert that the Commission “determin[ed]” that the temporary restrictions are reasonable on a permanent basis (*see* Barr Letter Attachment at 5).

²³ *Supplemental Order Clarification* ¶¶ 15-17.

²⁴ *Id.* ¶ 17.

difficulties in accessing or building alternative loop and transport facilities are different, regardless of whether they are used to provide local or interexchange services.²⁵ In fact, the RBOCs do not argue otherwise. Instead, however, they claim that there are differences between the local and special access markets that warrant the continued imposition of use and commingling restrictions. This claim is baseless.

AT&T's economic analyses of impairment for loops and transport assumes that the facilities under review are optimized for providing *both* local and interexchange services, because it looks at the total load of *all types* of traffic passing over them, just as a network engineer would do.²⁶ If these traffic loads were arbitrarily divided into local and special access traffic (or local, special access and other interexchange traffic) – as the RBOCs' proposals would require – then the requesting carrier's facilities would be *suboptimized* and its concomitant costs and requesting carriers' economic impairment would be even greater. Moreover, this is nothing more than a repackaging of the thoroughly discredited argument that incumbents may avoid the obligation to provide access to cost-based unbundled network elements by providing access to higher priced "services."²⁷ This completely refutes RBOC claims that competitors have not "introduced evidence, much less carried their burden of demonstrating that competitors are not impaired in the provision of special access service."²⁸ Moreover, as shown below, none of this accounts for the severe threats to interexchange competition that would result if use restrictions were allowed to continue after the incumbents enter the interexchange market.

It is also important to note that competitive carriers unanimously support the elimination of the onerous commingling restriction, which serves no purpose other than to impose inefficiencies and to inhibit competitive facilities construction.²⁹ As the Supreme Court held in *Verizon*, the Act and the Commission's implementing regulations require all carriers to operate efficiently.³⁰ Yet commingling restrictions inherently force requesting carriers, but not incumbents, arbitrarily to divide up their traffic into "local" and "non-local" segments and carry them on separate facilities. Not only is this patently discriminatory, it also forces requesting carriers to operate inefficiently and in a manner that no network engineer would use to design a network. Moreover, to the extent that the commingling restriction would "preserve" facilities-based competition that exists only

²⁵ AT&T Reply Comments at 179-87, 257-68.

²⁶ AT&T 11/25 *ex parte*, Attachments A and B.

²⁷ See note 13 above.

²⁸ Barr Letter Attachment at 4.

²⁹ See, e.g., ALTS *ex parte* letter dated November 14, 2002 at 5 (referring to the restriction as a "two-headed malevolent monster" that is "anti-competitor overkill"); ALTS/CompTel 10/28 *ex parte* at 4-5; AT&T Reply Comments at 292-96.

³⁰ *Verizon*, slip op. at 40 (referencing "the competitive purpose of forcing efficient choices on all carriers").

because of the pricing umbrella effect created by supracompetitive special access rates, that *inefficient* competition is certain to disappear over the short term as the ILECs fully enter the interexchange market.

The record is also clear that there is no likelihood that requesting carriers' use of UNEs would affect universal service subsidies. As has been shown, the CALLS proposal has already removed virtually all implicit subsidies from switched access rates,³¹ and there is no evidence at all that the availability of loop-transport combinations at UNE rates would shift any significant number of dollars from switched access to special access services. And even more important, there is no evidence that any such shift would materially impact the trivial subsidies still remaining in switched access rates. Indeed, even the RBOCs have abandoned this argument.³²

Despite these facts, the RBOCs have urged the Commission to make the existing use and commingling restrictions, and the associated "safe harbor" provisions, permanent in the rules that it adopts in the Triennial Review. The record shows, however, that those very restrictions have made it impossible for large carriers such as AT&T to convert loop-transport combinations purchased as special access services to UNEs *even when they are in fact used to provide local service to end users*.³³ Thus, those restrictions are preventing large carriers such as AT&T from using loop-transport combinations even for unquestionably *permitted* purposes. For example, AT&T has been forced to use special access services to provide nearly 100% of all its local services that use DS1 facilities, and also for a large proportion of its local services that use DS3 facilities. The record further demonstrates that such restrictions force competitors to operate inefficiently, which in turn impedes their ability to build out their own facilities networks, because the restrictions impose substantial expense where such construction can be justified, and they preclude construction in cases where it might otherwise be justified.³⁴ Thus, it is clear that the current restrictions serve only a single purpose: to increase the incumbents' excessive special access revenues at the expense of competitors, end users and competition, and to discourage investment in network expansion by competitors.³⁵

³¹ *E.g.*, AT&T Reply Comments at 290.

³² *See, e.g.*, the Barr Letter Attachment, which (reasonably) makes no mention of this issue.

³³ AT&T Reply Comments at 291-92.

³⁴ *Id.* at 287-89.

³⁵ The Commission's failure to regulate special access rates to assure that incumbents earn no more than a reasonable rate of return has exacerbated the anticompetitive impact of the Commission's use and commingling restrictions. Regulation of such rates is especially critical if the Commission continues to allow incumbents to impose any form of use or commingling restriction on competitors' ability to use UNE combinations to provide special access services.

The market impact of use and commingling restrictions is rapidly increasing - The market situation today is radically different from the one that existed in 1996, and even in 1999, when the *UNE Remand Order* and *Supplemental Order* were adopted. As a result, the anticompetitive impacts of use and commingling restrictions are rapidly accelerating, and their continuation seriously threatens competition in the otherwise vibrantly competitive interexchange market. This is yet another set of critical issues that the RBOCs completely fail to address, and they refute any argument that the Commission may focus only on the current state of the special access market.³⁶

When the interim use and commingling restrictions were initially permitted, RBOCs were excluded from the interLATA market and few other ILECs participated significantly in that market. Thus, interexchange competition was only minimally affected by the incumbents' non-cost-based access rates. Although they were able to increase IXCs' costs -- and thus keep rates unnecessarily high for IXC customers -- the incumbent ILECs themselves had only a small impact on the competitiveness of the IXC market. Today, however, that marketplace has substantially changed. GTE, the major non-BOC ILEC, has merged with Verizon, the RBOCs have concentrated their market power through mergers, and the § 271 process is nearly completed. As a result, the RBOCs have now announced their intent to compete vigorously in the large customer "enterprise" segment of the interexchange market.³⁷ IXCs do not oppose such competition as long as the incumbents participate on fair and nondiscriminatory terms. However, the use and commingling restrictions give the incumbents huge competitive advantages that IXCs cannot match and that will continue until and unless they are able to access loop-transport combinations on the same economic terms as the incumbents. Thus, if the Commission were to make the temporary use and commingling restrictions permanent, as the RBOCs urge, the incumbents will be able to leverage their monopoly power over key loop and transport facilities that are necessary inputs into the IXCs' services into the highly competitive IXC market (or more properly, the converging market for both local and long distance services).

Moreover, as AT&T demonstrated in its Special Access Petition, the RBOCs' special revenues have *trebled* since 1996, and their rates of return have nearly *quadrupled*, even as they have been given pricing flexibility for such services.³⁸ These facts clearly

³⁶ Notably in this regard, the RBOCs (*e.g.*, Barr Letter Attachment at 4) cite the total number of voice grade equivalents that competitors have been able to provide using their own facilities, facilities leased from other competitors "*or by reselling ILEC special access service*" (emphasis added). If, however, the ILECs themselves need only bear the TELRIC (or lower) costs of those vital inputs while competitors must rely on excessively priced special access services, the latter can expect only a short competitive lifespan.

³⁷ See, *e.g.*, <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=77993>.

³⁸ Special Access Petition at 9, 14. Incumbents' efforts to categorize their tariffed special access rates as "competitive" are thus absurd. Such rates are only "competitive" in the sense that they are deregulated. However, the deregulated rates of a carrier that wields substantial market power cannot legitimately be described in any economic sense as "competitive."

demonstrate that the Commission's pricing flexibility rules – which, as demonstrated above, were intended only to give the RBOCs additional pricing flexibility in the face of anticipated nascent competition – have not had the anticipated effect. Instead of driving rates down, they have allowed the RBOCs to raise wholesale access rates while offering targeted retail service discounts, which together create substantial price squeeze opportunities.

This is not just a theoretical concern. As the AT&T Special Access Petition shows, the RBOCs have successfully imposed price squeezes and almost completely remonopolized the market for local frame relay services, even though IXCs had previously provided a substantial share of such services.³⁹ Denying competitors access to UNE combinations by extending the use and commingling restrictions will similarly permit the RBOCs to remonopolize the long distance market now that they have nearly completed the § 271 process. Accordingly, the Commission should eliminate the use and commingling restrictions in order to maintain competitive balance and prevent the incumbent LECs from leveraging their local monopoly power into the otherwise competitive interexchange market.

These facts also highlight the disingenuousness of the RBOCs' implied claims that competitors could compete effectively *against the incumbents themselves* if they were denied access to UNEs and UNE combinations and had to purchase special access services in order to provide competitive services. Equally disingenuous are RBOC claims that competitors do not need access to UNEs or UNE combinations because they today “rely on special access services far more often than UNEs.”⁴⁰ In fact, the only reason why competitors have been forced to rely so heavily on special access is that the RBOCs have been able to prevent competitors from using UNEs because of the very use and commingling restrictions that they urge, and because the RBOCs' “no facilities” policies and their ordering and related procedures make it too difficult (or impossible) for AT&T and other competitors to order such elements.

“Appropriate” termination liabilities - Merely eliminating the current use and commingling restrictions, however, is not sufficient to allow AT&T to attain an equal competitive footing with the incumbent LECs, because termination liability penalties in existing tariffs and contracts often make it cost-prohibitive to convert existing special

³⁹ *Id.* at 24-25. See also AT&T's ILEC Broadband Dominance Comments at 23-25, which refute the RBOCs' claim that they do not control bottleneck facilities because long distance carriers control more than two-thirds of the retail market for ATM and Frame Relay. In making this claim, the RBOCs inappropriately lump together local and interLATA data services, the latter of which most RBOCs have only recently begun to provide as they obtained section 271 authority. In the local markets where the RBOCs have been able to compete, they have already parlayed their control over bottleneck facilities into control of *over 90%* of the retail ATM and frame services provided to large businesses – clear confirmation of enduring market power. In fact, the very source the RBOCs cited for their evidence concluded: the “[m]essage[] in the [d]ata [is that t]he RBOCs will continue to dominate” the markets for these services because they control the bottleneck facilities necessary to provide them. See IDC, U.S. Packet/Cell-Based Services Market Forecast and Analysis, 2000-2005, at 34 (2001).

⁴⁰ Barr Letter Attachment at 9.

access combinations to UNEs. In a brief footnote in the *UNE Remand Order* (n.985), the Commission “noted” that “any substitution of unbundled network elements for special access would require the requesting carrier to pay any *appropriate* termination penalties required under volume or term contracts” (emphasis added). That note, however, offered no discussion of what an “appropriate” termination penalty might be. And just as important, this note was written when the Commission had only permitted use restrictions to be applied to “entrance facilities,” *i.e.*, facilities that directly connect to an IXC’s point of presence, not to the increasingly expanded restrictions that were generated by the *Supplemental Order* and then reinforced by the *Supplemental Order Clarification*. Moreover, it was written at a time when the Commission stated that it intended to resolve the issues related to access to loop-transport combinations by mid-2000.

Since the Commission issued the *Supplemental Order*, large IXCs such as AT&T have been faced with a huge dilemma. Once the use restrictions were imposed, incumbent LECs gained substantial bargaining power in negotiating the costs and related terms of IXCs’ access arrangements. For example, as described in AT&T’s Special Access Petition, in order for AT&T just to maintain its wholesale access costs (even as the RBOCs were increasingly permitted rate flexibility on retail special access services), RBOCs extracted increasingly longer term commitments and harsher penalties against any attempt to convert special access arrangements to UNE combinations.⁴¹ As a result, AT&T is in a significantly *worse* position today than if the “interim” use and commingling restriction issues had been appropriately resolved two and a half years ago as the Commission promised.

Consequently, if the removal of the use and commingling restrictions are to have any current practical effect, it is critical that the Commission define “appropriate” termination liabilities in a manner that excludes unreasonable termination liabilities. Specifically, the Commission should require incumbents to include all facilities used, and all payments made, in connection with UNE combinations that replace special access arrangements in determining compliance with any contractual commitments, since the RBOCs will continue to be paid for the use of those same facilities.⁴² In addition, it is also

⁴¹ *Id.* at 21-23. In this regard, AT&T’s real-world experience in attempting to negotiate special access volume plans is instructive. In the summer of 1999, AT&T began extensive commercial negotiations with one of the major ILECs concerning the terms of a special access volume plan, including discounted pricing and service quality commitments. After the Commission’s *UNE Remand Order* was adopted in the fall of 1999, indicating that requesting carriers would be generally free to convert special access services to UNEs except for “entrance facilities,” the ILEC offered AT&T significant discounts off its then-prevailing special access prices, and it also responded positively to other AT&T negotiation requests. However, within days of November 24, 1999, when the *Supplemental Order* imposed the “significant local use” requirement on carriers’ ability to convert special access services to UNEs, the ILEC forwarded a copy of the order to AT&T and withdrew its previous proposals in their entirety.

⁴² The only conceivably legitimate basis for allowing an RBOC to assess termination liabilities would be if a carrier that purchased special access services canceled its use of the associated facilities during the term of its initial commitment. And even in such cases any

appropriate that incumbents be required, over a reasonable time, to allow all combinations that would otherwise qualify as UNEs to be converted without penalty, so that all carriers can operate on a level playing field in providing all telecommunications services. In no event should that period be allowed to extend for more than a brief time after an ILEC is authorized to provide interLATA services throughout a state or the effective date of the Commission's new rules.

Consistent with Commission rules, I am filing one electronic copy of this notice and request that you place it in the record of the above-referenced proceedings.

Sincerely,

A handwritten signature in black ink, appearing to be 'JM', with a long horizontal line extending to the right.

Joan Marsh

cc: Thomas Navin
Robert Tanner
Jeremy Miller

termination liability should be scaled to reflect the UNE price for such facilities, rather than the special access rate.