**Dee May**
Vice President
Federal Regulatory

**Verizon Communications**
1300 I Street, NW • Suite 400W
Washington, DC 20005

Phone 202-515-2529
Fax 202-336-7922
dolores.a.may@verizon.com

October 8, 2004

**Ex Parte**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Portals
Washington, DC 20554

**Re:** ***Unbundled Access to Network Elements*, WC Docket No. 04-313;**
***Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers*, CC Docket No. 01-338**

Dear Ms. Dortch:

On October 7, 2004, Ed Shakin and I, representing Verizon, met with Chris Libertelli of Chairman Powell's office and Matt Brill of Commissioner Abernathy's office.

The purpose of these meetings was to discuss Verizon's perspectives on how the Commission should approach its impairment analysis for high-capacity facilities. Verizon reviewed maps and data filed with the Commission on October 4, 2004 and earlier on June 24, 2004, showing the presence of competitors' facilities and their use of special access services. Verizon provided a summary sheet of some of the relevant data in these filings. In addition, Verizon explained why the ETI "study" of special access was premised on errors and misconceptions of the actual market for high capacity services.

Verizon also discussed ways to evaluate impairment for DS-1 loops. Among the points raised was the concentration of competitive alternatives in high density wire centers, such as those with 5,000 or more business lines. Verizon also brought up the importance of recognizing the availability and use of special access in any evaluation of impairment for DS-1 loops in particular. Such consideration was beyond the scope of the Commission's tests for special access pricing flexibility – the last time the Commission undertook to establish a comprehensive scheme to evaluate competition for high capacity services.

Please place this notice in the record of the above proceedings.

Sincerely,

Attachments

c: Chris Libertelli
Matt Brill

# ATTACHMENT 1

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

| | |
|---|---|
| In the Matter of | |
| Unbundled Access to Network Elements | WC Docket No. 04-313 |
| Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers | CC Docket No. 01-338 |

## COMMENTS OF VERIZON[1]

## INTRODUCTION AND SUMMARY

The world has changed dramatically since the time that the record was compiled in the *Triennial Review* Proceeding, and these enormous technological and market changes have rendered many of the issues that were debated vigorously during the course of that proceeding effectively moot. In light of these changes, a close examination of the market facts of today reveals that all segments of the telecommunications industry are now subject to intense competition that has emerged entirely without competing carriers relying on unbundled network elements. This is equally true of the mass market that was the subject of intense debate during the prior proceeding and of the high-capacity segment of the business that has been the focus of facilities-based entry since long before the Telecommunications Act of 1996 was passed. In the provision of high-capacity services, competing carriers are competing successfully using a combination of their own facilities, facilities obtained from alternative providers, or special

[1] The Verizon telephone companies ("Verizon") are identified in Appendix A to these comments.

access obtained from incumbent LECs, wherever demand for these services exists. In the mass market, cable operators, Voice over IP ("VoIP") providers, and wireless companies are providing customers across the country voice services that compete directly with ILEC service and that are comparable in price, quality, and functionality. This proceeding provides the Commission with a fresh opportunity to take these market developments fully into account, and to adopt rules that conform to the standards prescribed by the 1996 Act and the binding decisions of the appellate courts and the Supreme Court. Doing so is critical to provide certainty to the industry as a whole, and to allow the industry to move beyond debates about yesterday's issues and get on with the job of building the nation's broadband future.

As an initial matter, the fact that much of the competition in today's marketplace comes from intermodal sources is hardly surprising. On the contrary, in capital intensive industries such as this one, competition typically develops from intermodal sources, not just from a company duplicating the product or service of another company. Thus, railroads not only compete with other railroads, but also with barges, trucks, and airplanes. Passenger airplanes compete among themselves, as well as with passenger railroads and cars. And Federal Express competes not only with United Parcel Service and the Postal Service, but also with telephone-based facsimile service and e-mail. As in these other industries, competition in the telecommunications industry today is coming from both intramodal *and* intermodal sources.

The Commission has long recognized that the market for high-capacity facilities and services is a source of mature competition in telecommunications markets, and that imposing an unbundling obligation in this segment would jeopardize existing facilities-based competition. The evidence provided here shows that that is even more true today than ever before. Wherever demand for high-capacity services and facilities exists, carriers are competing successfully using

a combination of their own or alternative facilities and special access service to serve end-user business customers, and are doing so in many instances more successfully than Verizon itself. Under these facts and the case law that has been developed in five different decisions of the Supreme Court and the D.C. Circuit, the Commission may not require unbundling of high-capacity facilities.

The demand for such high-capacity services is highly concentrated, and is therefore ideally suited for competitive supply. For example, 80 percent of the demand for Verizon's high-capacity special access services is concentrated in roughly 8 percent of its wire centers. In those highly concentrated areas, competing carriers can and have built their own extensive networks. Indeed, just based on the limited data available to it, Verizon has identified competing facilities in more than *two-thirds* of the wire centers in its major metropolitan areas that account for 80 percent of the demand for high-capacity special access services. Moreover, competition is coming from a variety of carriers. Nationally, there are an average of 20 networks in each of the 50 largest Metropolitan Statistical Areas ("MSAs"). In Verizon's territory, we have prepared maps based on publicly available information and our own physical inspections that show not only the location of competing networks, but specific lit buildings served by competing carriers. Competitors include not only large traditional long-distance carriers— that offer a full array of high-capacity services and serve the bulk of the needs for large enterprise businesses but, also smaller carriers that target smaller customers who may need only a single DS1. They also include intermodal providers like cable companies and utilities, which have branched out from their traditional markets to offer high-capacity fiber on a retail and wholesale level.

Competing carriers are not limited to their own networks however. Many of the same carriers competing for retail business offer their fiber to other carriers on a wholesale basis.

Indeed, Verizon's own experience competing for business customers out of its home region is that competing carriers using a combination of their own and other carriers' facilities offer a fully competitive alternative to ILEC services. And other carriers also are successfully serving business customers of all shapes and sizes using special access services purchased from Verizon, either exclusively or to supplement their own facilities or facilities leased from alternative carriers. Inded, the bulk of special access — 80 percent for Verizon — is sold on a wholesale basis to other carriers. Carriers purchase that special access at deep discounts from the monthly tariffed price and use it as yet another avenue for competition. And over 90 percent of the high-capacity services provided by Verizon to competing carriers are purchased as special access, not unbundled elements. This is true for both DS1s as well as DS3s, and is true for the largest carriers as well as the smaller carriers. The detailed maps and lists of types of customers served demonstrate that competitors use those special access services to serve all sizes and types of customers throughout Verizon's service territory. As the D.C. Circuit made clear, where carriers can compete using special access, "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004) ("*USTA II*").

Similarly, technological and market developments since the *Triennial Review* proceeding have created extensive competition for mass-market switching throughout the country without competing carriers relying on unbundled switching or the UNE platform. Accordingly, the Commission cannot lawfully require unbundling of these mass-market UNEs. Cable companies offer circuit-switched voice telephone service to 15 percent of homes nationwide, and already offer VoIP service to substantially more homes. By the end of 2004, cable companies plan to

offer VoIP to more than 24 million homes over their networks, and they plan to offer it to more than 40 million homes by the following year. And regardless of whether cable companies offer VoIP, the nearly 90 percent of U.S. homes that have access to cable modem service also have access to VoIP from multiple competitors ranging from the major long-distance carriers such as AT&T to national VoIP providers like Vonage.

Wireless carriers also are aggressively competing with voice telephone services, for both local access lines and traffic. Since the time of the *Triennial Review* proceeding alone, the number of wireless lines has grown from 129 million to 161 million, while the number of wireline access lines has declined. The percentage of users giving up their landline phones has grown from 3-5 percent to 7-8 percent. Wireless has already replaced approximately 11 million wireline access lines, and that number is expected to double by 2008. Moreover, in addition to substituting for entire lines, wireless service is carrying millions of minutes that would otherwise be carried on wireline networks, and is therefore directly substituting to an even greater extent for incumbent carriers' switching services. Wireless traffic has grown from 16 to 29 percent of all voice traffic and to 40 percent of long-distance traffic.

In addition, the Commission should use this proceeding to eliminate any doubt that, unless this Commission finds impairment under 17 U.S.C. § 251(d)(2), incumbents have *no* obligation to provide access to a network element as a UNE at TELRIC rates. Any state commission decision purporting to establish such an obligation is inconsistent with — and therefore preempted by — federal law. The Commission should also reaffirm its exclusive jurisdiction over § 271 and network elements that must be unbundled solely pursuant to § 271, and should make clear that state commissions have no authority to regulate these 271 elements.

# ATTACHMENT 2

# TRO FACT SHEET

## Demand Concentration

- 80% of the special access demand is in less than 9% of Verizon wire centers;
- three-quarters of those wire centers are located in just 20 of Verizon's top MSAs;
- 85% of special access revenues from end user customers come from sales to large enterprise.

## Competitive Deployment

- at least 1 network in 98 of the top 100 MSAs.
- an average of 20 in each of the top 50 MSAs.
- more than 180,000 route miles of fiber:

  - AT&T – 21,000 *local* route miles in 70 MSAs
  - TWT – 12,247 *local* route miles in 41 MSAs
  - XO – 23,800 total route miles in 34 MSAs
  - MCI – 9,000 *local* route miles 63 MSAs
  - Cox – 9,500 total route miles in 23 MSAs
  - TelCove – 8,700 *local* route miles in 48 MSAs

- connecting to thousands of buildings:

  - AT&T – 6,400 on net;
  - TWT – 4576 on net; 17690 served;
  - XO – 2,435 on net;
  - KMC – 1,700 on net;
  - Cox – 6,600 on net;
  - Telecove – 2,500 on net.

- to reach buildings with greatest expenditures:

  - 65% of buildings with more than $6 million in annual telecommunications expenditures lit;
  - 57% of buildings with $4-6 million lit;
  - 50% of buildings with $2-4 million lit.

## Competitor Use of Special Access

- 80% of Verizon's special access revenues are derived from sales to carrier customers.

## Special Access v. UNE (All)

- DS1 – 93% of circuits were purchased as special access versus 7 % UNEs;
- DS3 – 98% special access versus 2% UNEs;
- DS1 combinations – 95% purchases as special access versus 5% purchases as EELs.

## Special Access v. UNE
(Less AT&T, MCI, Sprint)

- DS1 – 88% purchased as SA v. 12% UNEs;
- DS3 – 95% purchased as SA v. 5% UNEs;

## Special Access v. UNE
(Less Wireless)

- DS1 – 91% purchased as SA v. 9% UNEs;
- DS3 – 97% purchased as SA v. 3% UNEs;

## Special Access v. UNE
(Less AT&T, MCI, Sprint & Wireless)

- DS1 – 85% purchased as SA v. 15% UNEs;
- DS3 – 94% purchased as SA v. 6% UNEs;

## Special Access Pricing Statistics

- Customers buy under volume & term discounts. For example, carriers buy special access at rates that are 35-40% off monthly rates;
- $403 = average of monthly tariff rates;
- $247 = actual average customers pay per DS-1;
- $168 = actual average rate customer pay for UNE DS-1 circuit.

## Competitor Use of Other Alternatives

- service is being provided using fixed wireless:
  - 40% of large business;
  - 29% of med-sized business;
  - 23% of small businesses using fixed wireless for at least some high capacity services.
- 5/4/04 WilTel using fixed wireless to expand networks in Tier 2 and 3 markets.
- service is being provided using cable modem:
  - 41% of large businesses;
  - 32% of mid-sized businesses;
  - 44% of small businesses using cable modem for at least some high capacity services.
- XO rolling out fix wireless and owns licenses in 95% of the top markets in the country.

09/27/2004

# ATTACHMENT 3

## THE ETI REPORT DISTORTS MARKET FACTS ON HIGH CAPACITY COMPETITION

ETI argues there is no competition in the market for high capacity services and that as a result, ILECs have raised prices for special access services, resulting in harm to end user customers. ETI is wrong for two reasons.

- First, as described below, there is extensive competition to provide end user customers high capacity services both from competitors who have deployed their own facilities to serve these customers as well as from competitors who are using exclusively ILEC special access services or a combination of their own facilities and ILEC special access services.

- Second, because of this extensive market competition, the prices both carrier and end user customers are actually paying for special access services have actually declined.

*ETI argues CLECs are dependent upon ILEC special access for "last mile" (local loop) connections to enterprise customers because CLECs have deployed their own facilities to only 1% of ETI's estimated 3-million commercial buildings in the United States.* The truth is:

**There Is Extensive Competition to Provide End User Customers High Capacity Services.**

- Demand for high capacity facilities is highly concentrated in downtown business districts.

  - 80% of the special access demand is in just 8.5% of Verizon's wire centers.
  - Three-fourths of those wire centers are located in just Verizon's top 20 MSAs.
  - ETI distorts the percentage served by including thousands of small buildings that are not served by *any* high capacity facilities because there is no demand there.

- Competing providers have deployed high capacity facilities to meet that demand:

  - There is at least 1 competitive network in 98 of the top 100 MSAs in the country;
  - There is an average of 20 competitive networks in each of the top 50 MSAs.

- Competing providers have deployed 180,000 route miles of fiber including:

  - AT&T – 21,000 *local* route miles in 70 MSAs;
  - Time Warner – 21,247 local route miles in 41 MSAs;
  - XO – 23,800 total route miles in 34 MSAs;
  - MCI – 9,000 *local* route miles in 63 MSAs;
  - Cox – 9,500 total route miles in 23 MSAs;
  - TelCove – 8,700 *local* route miles in 48 MSAs.

- Competing providers, in fact, have connected to thousands of buildings including:

  - AT&T – 6,400 on net;
  - Time Warner – 4,576 on net; 17,690 served;
  - XO – 2,434 on net;
  - KMC – 1,700 on net;
  - Cox – 6,600 on net;
  - TelCove – 2,500 on net.

- CLECS themselves, including AT&T, boast about the extensive reach of their networks:

  - Time Warner earns the "majority of [its] revenue ... exclusively through [its] own network facilities ..." and boasts that "[w]hile [RBOCs] have lots of fiber deployed, I don't know that they have more buildings connected than we do in all cases."
  - AT&T tells investors that its own network "touches virtually all Fortune 1,000 Companies," and that its core network extends "all the way to the customer premises;"
  - Level 3 states that its "metro networks comprise almost one million miles of installed optical fiber and connect to 792 on-net buildings."

- Demand for high capacity services is so concentrated that competitors have deployed their own facilities in markets that represent 80% of Verizon's high capacity services.

  - Data Verizon purchased from GeoTel and physical inspections confirm that there are competing providers with their own fiber in each of Verizon's top 20 MSAs.
  - Data purchased from GeoResults confirm that competing providers have extended the reach of the fiber networks to thousands of buildings in Verizon's top 20 MSAs.

- ETI relies on maps created by Verizon that show the success of CLECs using special access, but fails to acknowledge maps from the same filing that demonstrate that other CLECs are using non-Verizon facilities to serve customers in the same locations.

  - Attachment 1 shows competitive fiber and lit buildings in the New York MSA.
  - Attachment 2 shows that competitors have deployed facilities and equipment to many of the same locations that other CLECs are serving using special access services.

- ETI also denies the scope of inter-modal competition from fixed wireless and cable.

  - Analysts report that 40% of large business (5,000+ employees) use fixed wireless or cable service for at least some high-capacity service. (In-Stat/MDR, Dec. 2003).

- Finally, independent analysts confirm that ETI has its basic facts wrong:

  - ETI ignores the fact that large carriers purchased major providers of high cap services:

    "The large carriers made multi-billion dollar acquisitions (i.e. Teleport, MFS, Brooks Fiber) to improve their reach in local markets to improve their cost structures and lower their dependence on the Bells. As a result, we believe that roughly 25% of AT&T's customer connections are on-net – utilizing their own facilities to reach customers. We believe this figure is between 10-20% for MCI. When these carriers are required to use off-net facilities they try to use third party connectivity (CLECS, utilities) when available to avoid Bell special access. These figures contrast with the white paper that suggested that the Bells control 98% of the special access market – a figure we believe is much too high." (UBS, "Telecom Wake-Up Call").

  - Royce Holland: "The large ... enterprise market . . . is all but irrelevant in the debate over competition policy because there are no bottleneck facilities." (TR Daily 12/03).

*Despite this overwhelming evidence, ETI argues there is a lack of competitive alternatives based on the "fact," according to ETI, that ILECs have raised prices for special access services. ETI makes it claim based on the monthly ("sticker price") rates in ILEC tariffs. The truth is:*

**Prices competing providers actually pay for special access services have declined *because of* the availability of competitive alternatives in the high capacity market.**

- Customers do not pay the monthly tariffed rates, but instead actually buy special access services at deep discounts of 25 to 40 percent off those monthly rates.
  - Attachment 3 shows the difference between the *monthly* tariffed rates for a DS-1 circuit ($403) and the average price per DS-1 circuit customers are actually paying ($254).
- Prices Verizon customers are actually paying for DS-1 special access circuits have declined by 9% since 2001, and the overall decrease in prices actually paid for all special access services was even higher.
- As Attachment 4 shows, even the ARMIS data relied on by ETI confirms that the average price per special access line sold by the RBOCs has fallen during the period of pricing flexibility, and that the price charged by Verizon has fallen even faster.
- This extensive competition in the market for high capacity services has changed dramatically the way both our wholesale and retail customers do business with us.
  - Some wholesale customers who have deployed or purchased facilities deeper into our network are migrating off Verizon's special access facilities onto their own facilities.
  - Others that are more aggressive make it clear that they prefer to build themselves and will do so unless Verizon provides more cost effective prices for the facilities they need.
  - Even customers who have not deployed their own facilities but instead rely almost exclusively on special access to compete report they have lots of other alternatives and threaten to take their business elsewhere if Verizon does not offer competitive prices.
  - As a result, retail customers receive bids for high capacity services from multiple vendors and, therefore, demand competitive pricing when purchasing these services.
- Verizon has responded to this competition and to customer-specific requests for price reductions both through volume and term discounts mentioned above and through contract tariffs offered in areas where we have pricing flexibility for high capacity services.
  - To encourage competing providers to continue to purchase entrance facility services from us, in May, Verizon offered an additional 8% off the already discounted 5-year term rates to customers who agreed to purchase a certain number of SONET[1] services.
  - To encourage competing providers to keep their high capacity transport services with us, Verizon previously offered additional discounts of between 15-21% off 5-year term rates to customers who renewed their already existing SONET services.
  - Verizon also filed contract tariffs, including more than 5 New Connect Plans, offering customers additional discounts of between 10%-20% off already low term rates when they order new SONET, DS-3s, DS-1s and Facility Management Services.

[1] SONET (Synchronous Optical Network) services allow customers to transport DS-1s, DS-3s, OCn, and now Ethernet services.

- While Verizon has lost some retail accounts because it did not have pricing flexibility for services the customer required and, therefore, could not match an un-regulated competitor's price, many retail customers have qualified for price flex offerings.

    * One customer took advantage of an offer that provided a discount of nearly 25% off the 5-year term plan rates for DS-3 circuits and 16% off those rates for DS-1s.
    * Another took advantage of an offer that provided 20% off new SONET rings (using the New Connect Plans), and 13% off our 5-year term rates for DS-1 services.
    * One government agency took advantage of an offer that provided 20% off OC-192 IDSR rings and 30% off IOTS services, both high capacity transport services.

- Through volume and term discounts and these contract tariff offerings one carrier customer, which relies exclusively on special access services to serve enterprise customers, has achieved a 21% reduction in prices per circuit in just the last 18 months.

*Relying on data from the FCC's ARMIS reports, ETI argues ILEC abuse of their market power is evident by their excessive rates of return. The truth is:*

- The FCC has recognized that the category-specific data computations from ARMIS reports

    - are not reliable indicators of market power and "do[] not serve a ratemaking purpose."

    - has referred to the cost-allocation rules as "outdated regulatory mechanisms that are out of step with today's rapidly-evolving telecommunications marketplace"; and

    - has indicated that reducing "regulatory reliance on earnings calculations based on accounting data is essential to the transition to a competitive marketplace."

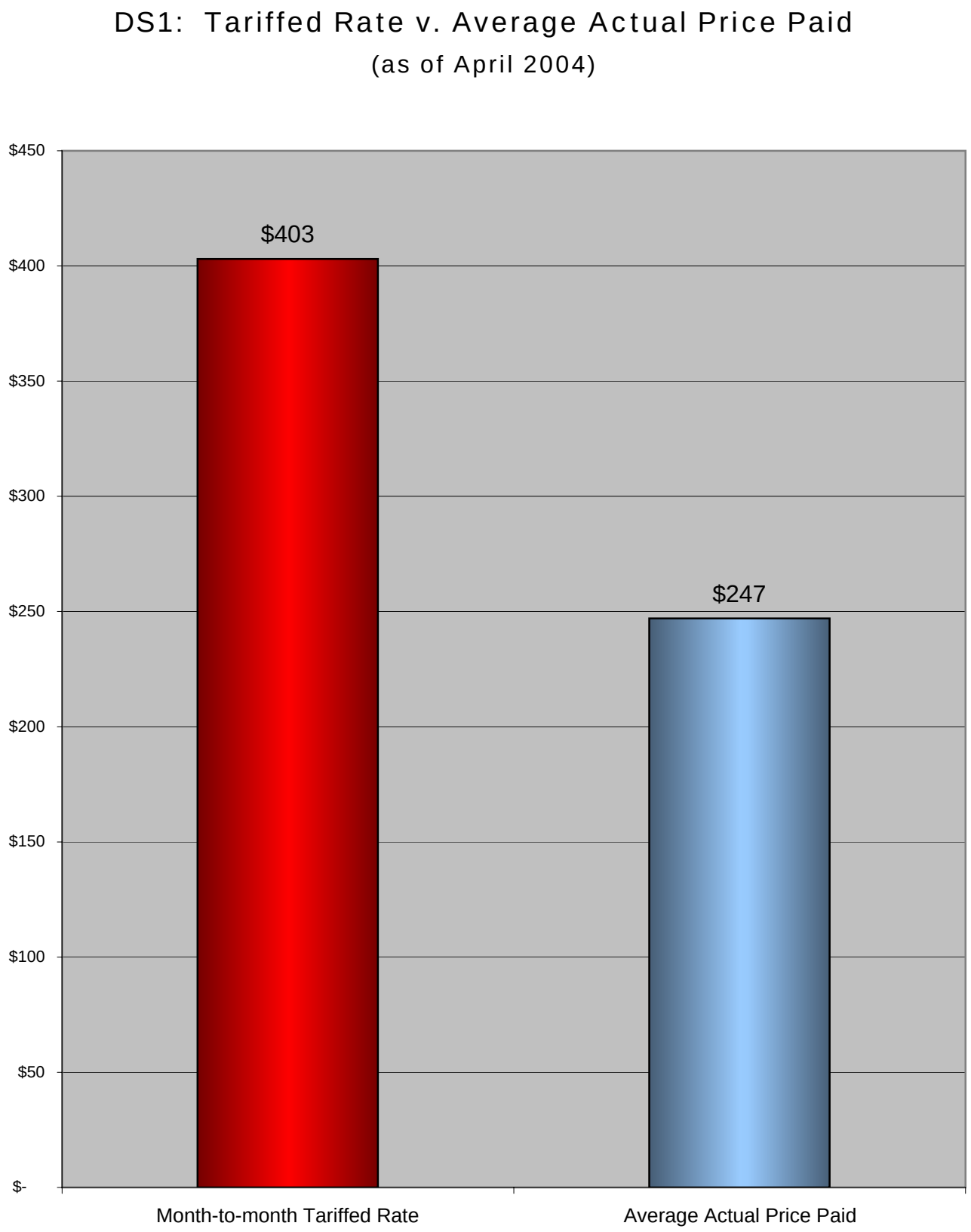
- The problem of mismatches is particularly acute with respect to special access because the rules assign the growing *revenues* associated with DSL services and interstate packet-switched services to the special-access element, but assign a significant portion of the associated interstate *costs* to other elements.

- AT&T's own experts agree:

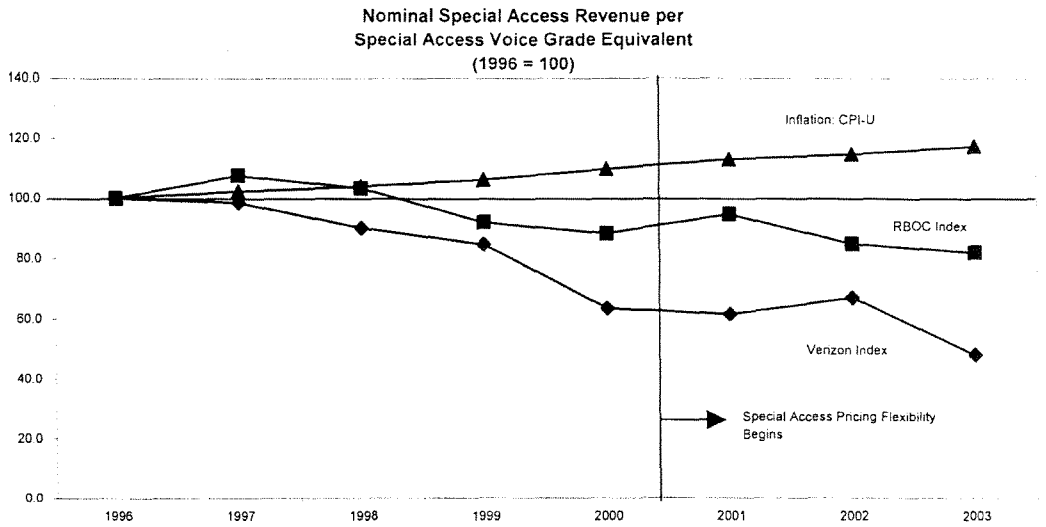
    - "Because [a carrier's] services use[] the same network, computers[,] and other facilities whatever the jurisdiction, determining the cost basis for calculating an economically meaningful rate of return is impossible."

    - AT&T experts have acknowledged that, "fully allocated cost figures and the corresponding rate of return numbers simply have zero economic content" and "cannot pretend to constitute approximations to anything."

# ATTACHMENT 4


DS1: Tariffed Rate v. Average Actual Price Paid
(as of April 2004)
$450
$400
$350
$300
$250
$200
$150
$100
$50
$-
$403
$247
Month-to-month Tariffed Rate
Average Actual Price Paid

# ATTACHMENT 5




Source: FCC ARMIS Report 43-08, 43-03, BLS