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

COMMENTS OF BELLSOUTH

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BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), hereby submits its Comments in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

On January 31, 2005, the Commission released the *Order and Notice of Proposed Rulemaking* ("*NPRM*") in this matter to "commence a broad examination of the regulatory framework to apply to price cap local exchange carriers' (LECs) interstate special access services after June 30, 2005."[1] Although the *NPRM* raises a myriad of issues relating to special access services, there are two fundamental questions that must be answered as a threshold matter. First, how should the Commission approach the regulation of special access services upon the expiration of the *CALLS Order*?[2] Second, is it appropriate to continue pricing flexibility regulation in some form?

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[1] *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25; RM-10593, *Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 1994, 1995, ¶ 1 (2005) ("*NPRM*").

[2] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board On Universal*

BellSouth proposes that these questions be answered as follows: First, upon the expiration of the *CALLS Order*, the Commission should take precisely the action that it contemplated at the time the *CALLS Order* was adopted. The *CALLS Order* states that the plan is a transitional mechanism that was implemented with the intention that, when the plan expires, the Commission would commence a proceeding to determine whether special access services should be deregulated in light of the current level of competition. BellSouth urges the Commission to follow through with this intended course of action.

Furthermore, upon examining the current state of competition in the special access market, the Commission should conclude that prices can best be set by the market rather than by regulatory mandate. BellSouth advocates this approach because a review of the pertinent data prompts the conclusion that competition in the special access market is both robust and rapidly growing. BellSouth submits herein an analysis of price and revenue trends of special access services and an analysis of the market shares of BellSouth and its competitors. Each analysis demonstrates the existence of widespread competition. BellSouth also submits herein the declaration of Harold Furchtgott-Roth and Professor Jerry Hausman, who conclude that price regulation is not an economically rational approach to the market for special access services. Taken together, this information conclusively demonstrates that the special access market is robustly competitive, and presents a compelling case against both the continuation and expansion of price regulation.

Service, CC Docket Nos. 96-262, 94-1, 99-249 & 96-45, *Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45*, 15 FCC Rcd 12962 (2000) ("*CALLS Order*").

In response to the second question, BellSouth submits that the current form of pricing flexibility has achieved its purpose; there is currently sufficient competition for special access services so that the market will constrain prices. Price regulation is no longer needed. Given this, the Commission should, as a transitional mechanism, remove all restraints on the LECs' pricing of special access services in all areas for a period of two years by granting Phase II pricing flexibility. At the end of this two year period, special access services should be completely deregulated. However, if the Commission determines that the current pricing flexibility test should remain in place, then BellSouth proposes that the test be modified to take into consideration the use of UNEs by competitive service providers.

II. AN ASSESSMENT OF COMPETITION MUST PRECEDE THE ADOPTION OF THE PROPER REGULATORY FRAMEWORK

A. The Tentative Conclusions of the *NPRM*

BellSouth submits that the Commission should continue in the direction charted by the Commission when it adopted the CALLS plan. In contrast, the *NPRM* sets out on a tentative course in a much different direction. In response to the fundamental questions noted-above, the *NPRM* states the following:

> We tentatively conclude that we should continue to regulate special access rates under a price cap regime and that the price cap regime should continue to include pricing flexibility rules that apply where competitive market forces constrain special access rates. This approach will allow the market to determine rates where competitive market forces exist, while protecting special access consumers from unreasonable rates where competition is lacking.[3]

[3] *NPRM*, 20 FCC Rcd at 2004, ¶ 24.

Having reached these tentative conclusions, the *NPRM* proposes to examine competition in the special access market, but to do so only in the context of determining whether pricing flexibility should continue (and, if so, whether the rules should be changed).[4]

Thus, while acknowledging the intention of the Commission at the time CALLS was implemented,[5] the *NPRM* makes no effort to act in a way consistent with that intention. Instead, the *NPRM* makes a 180 degree turn from the path of decreasing regulation of special access that the Commission has followed consistently over the past 15 years, and contemplates restrictive forms of regulation that are throwbacks to regulatory regimes of the past. For example, the *NPRM* considers the use of both productivity factors set at levels previously ordered at various times in the 1990s,[6] and benchmarking prices to yield the equivalent of an 11.25 percent rate of return.[7] It is surprising that the Commission would contemplate this sea change in regulatory policy, which represents a complete abandonment of the movement toward allowing the market to set prices that was contemplated in the *CALLS Order*.

As explained below in Section II.C., the tentative conclusion to continue the current price cap regime, and the prospect of a return to the restrictive version of price cap regulation that existed prior to the implementation of CALLS, is misguided. Further, the Commission reached this tentative conclusion without making any findings

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4 *See id.* at 2019-30, ¶¶ 73-112.

5 *Id.* at 2000, ¶ 14.

6 *Id.* at 2007, ¶ 32.

7 *Id.* at 2008, ¶ 35.

(tentative or otherwise) as to the current state of competition. Instead, this conclusion is premised only upon a very limited utilization of ARMIS data, which, as explained in detail below, has no usefulness in assessing profitability, expenses, demand growth or any other aspect of special access services.

While BellSouth agrees that the current level of special access competition must be assessed, this assessment should dictate all aspects of the regulatory regime that applies to special access services. This assessment should not be limited to the task of modifying the pricing flexibility rules. Instead, the Commission must conduct a competitive analysis of the special access market to decide whether competition has progressed to the extent that the market should be allowed to control prices, rather than an outdated regulatory pricing regime. ARMIS data simply cannot be used as a surrogate for this competitive analysis.

B. The History Of The CALLS Plan

To determine what should be done at the expiration of the CALLS plan, it is necessary to review the history of that plan, and especially the pro-competitive goals upon which the plan was based. Before approving the plan, the Commission provided in the *CALLS Order* a useful review of the past regulatory treatment of special access services:

> Through the end of 1990, access revenues were governed by "rate of return" regulation. Under rate of return regulation, incumbent LECs calculate the specific access charge rates using projected costs and projected demand for access services. An incumbent LEC is limited to recovering its costs plus a prescribed return on investment, and is

potentially obligated to provide refunds if its interstate rate of return exceeds the authorized level.[8]

In 1991, the Commission implemented price cap regulation, which deviated from rate of return regulation's historical focus on limiting profits to focus "primarily on the prices that an incumbent LEC may charge and the revenues that it may generate from interstate access services."[9]

After the passage of the 1996 Act, the Commission revised the structure of access charges in the *Access Charge Reform Order*.[10] The purpose of the structural revision was to align "the rate structure more closely with the manner in which costs are incurred."[11] In the *Access Charge Reform Order*, the Commission stated specifically, "that its primary method for bringing about cost-based access charges was by letting competition establish efficient rates."[12] Further, when it issued the *Access Charge Reform Order*, "the Commission anticipated creating, in a later stage of access reform, a mechanism whereby rate regulation of services would be lessened, and eventually eliminated, as competition developed."[13]

Consistent with this goal, the Commission adopted the CALLS plan in 2000. In doing so, the Commission declared that, "the Order we adopt today will result in lower

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8 *CALLS Order*, 15 FCC Rcd at 12968, ¶ 13.

9 *Id.* at 12968, ¶ 15.

10 *Access Charge Reform, et al.,* CC Docket No. 96-262, *et al., First Report and Order*, 12 FCC Rcd 15982 (1997) ("*Access Charge Reform Order*"), *aff'd sub nom., Southwestern Bell Tel. Co. v. FCC,* 153 F.3d 523 (8th Cir. 1998).

11 *CALLS Order*, 15 FCC Rcd at 12969, ¶ 18.

12 *Id.* at 12970, ¶ 20, citing *Access Charge Reform Order.*

13 *Id.*

rates for both low-volume and high-volume long-distance consumers, more competition, fewer line items on consumer's phone bills, greater flexibility for price cap LECs to meet competition, and an explicit, portable interstate access universal support mechanism."[14] At the same time, the Commission made clear that CALLS was not intended to be a permanent fixture, but rather a transitional mechanism:

> The CALLS Proposal is not designed as a permanent solution to all of the issues that it addresses; instead, it is a transitional plan that moves the marketplace closer to economically rational competition, and it will enable us, once such competition develops, to adjust our rules in light of relevant market developments. Consequently, as the term of the CALLS Proposal nears its end, we envision that the Commission will conduct a proceeding to determine whether and to what degree it can deregulate price cap LECs to reflect the existence of competition.[15]

The Commission also noted that by adopting the CALLS proposal, it was allowing "four additional years for competition to develop sufficiently to begin to control access rates."[16]

Against this background, the only logical and consistent step for the Commission to take now is for the Commission to do precisely what it contemplated in 2000: to assess the level of competition and, if competition warrants, to begin the process of deregulating the prices for special access services.

C. ARMIS Data Cannot Substitute For A Proper Assessment of the Competitive Market

The Commission's tentative conclusion to drastically reverse the course charted in the *CALLS Order* was reached before considering the state of competition in this market, and based solely on ARMIS data. According to the *NPRM*, ARMIS data suggests that

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14 *Id.* at 12974, ¶ 28.

15 *Id.* at 12977, ¶ 36 (citations omitted).

16 *Id.* at 12979, ¶ 44.

throughout the entire life of price cap regulation, the BOCs have recognized scale economies in the special access market because, "special access line demand [has] increased at a significantly higher rate than . . . operating expenses and investment."[17] Even while stating this tentative conclusion, however, the *NPRM* also acknowledges the existence of evidence indicating that "the accounting rates of return derived from ARMIS data are meaningless."[18] Specifically, the *NPRM* cites to the Declaration of Alfred E. Kahn and William E. Taylor as "claiming that accounting rates of return for services such as interstate special access services are meaningless because these returns reflect arbitrary allocations of fixed costs between regulated and non-regulated services, between interstate and intrastate jurisdictions, and among interstate services."[19] The *NPRM*, nevertheless, relies upon ARMIS data, and finds that it is appropriate to do so, because the data is only being used for the limited purpose of comparing demand growth to growth in expenses and investment.

Specifically, the *NPRM* states that, since it is proposing to use ARMIS data for the limited purpose of comparing demand to expenses and investments, and the same accounting rules applied throughout the entire period analyzed, then the cost allocation issues should not present a problem.[20] This analysis, however, proceeds from two fundamentally flawed premises. The first flawed premise is the idea that ARMIS

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17 *NPRM*, 20 FCC Rcd at 2006, ¶ 29.

18 *Id.*

19 *Id.* ¶ 29 & n.93, citing Declaration of Alfred E. Kahn and William E. Taylor, On Behalf of BellSouth Corporation, Qwest Corporation, SBC Communications, Inc., and Verizon, Exhibit 1 to Comments of BellSouth, RM No. 10593, at 6-9 (filed Dec. 2, 2002) ("Kahn/Taylor Decl.").

20 *Id.*

accounting data is a valid means of assessing the special access market and can provide a reliable yardstick for measuring relative changes in demand, expenses or investments as long as the accounting rules are consistently applied. A Declaration filed by William E. Taylor, Ph.D. and Aniruddha Banerjee, Ph.D., clearly explained the reasons that the consistent use of irrelevant accounting information can not lead to relevant results.[21] This Declaration was filed in response to a report filed by the Ad Hoc Telecommunications Users Committee ("Ad Hoc") that proposed, in part, a use of ARMIS data similar to that contemplated in the *NPRM*. Drs. Taylor and Banerjee first noted that there is a fundamental problem with any attempt to use ARMIS data to derive the profitability of special access services. To do so amounts to utilizing "an accounting rate of return (based on fully distributed, embedded cost) as a surrogate for 'profit.'"[22] They then summarized the reasons that such an approach is invalid:

> No allocation of ILEC accounting costs between regulated and unregulated intrastate and interstate services can be cost-causative. Among interstate services, the allocation of costs to special access services requires additional arbitrary assumptions. This is hardly surprising because fixed and shared and common costs represent a significant fraction of an ILEC's total costs. When a multiproduct firm like an ILEC uses one network to provide interstate and intrastate services, carrier services (special and switched access), and retail services (local and long distance), there is no non-arbitrary or cost-causative way to allocate costs that are not directly attributable to individual services. [footnote omitted][23]

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21 Declaration of William E. Taylor, Ph.D., and Aniruddha Banerjee, Ph.D., NERA Economic Consulting, On Behalf of BellSouth Corporation, RM No. 10593 (filed Nov. 8, 2004) ("NERA Decl.").

22 *Id.* ¶ 13.

23 *Id.* ¶ 19.

Thus, a valid assessment of the special access market cannot be made on the basis of ARMIS data. This fact holds equally true even if ARMIS is used for the "limited purpose" set forth in the *NPRM*. In effect, the *NPRM* attempts to use invalid estimates based on ARMIS data to determine whether the invalid figures become larger or smaller during the time period in which this inappropriate accounting framework is applied. Even if the premise were correct that the accounting framework has not changed during this time period, the use of ARMIS data is still a meaningless exercise.

The declaration by Drs. Taylor and Banerjee also refuted an attempt by Ad Hoc to minimize the allocation problem as follows:

> Ad Hoc attempts to minimize the problems with cost allocation by arguing that "mis-allocations at the margins" have little adverse effects on trends in data because those "mis-allocations do not change from period to period." *ETI Report,* at 29. We disagree with that premise. When fixed and shared and common costs are a fraction of the ILEC's total cost, misallocations are unlikely to be minor, in and of themselves, or have benign consequences for pricing services. Therefore, almost universally, economists reject allocated (or distributed) costs as the basis for efficient pricing, regardless of whether the misallocations are small "at the margin" or invariant over time.[24]

Drs. Taylor and Banerjee addressed the second flawed premise of the *NPRM*, that ARMIS data can be used because it has been consistently subjected to the same accounting rules, by noting that the applicable accounting rules did, in fact, change over the time period in question. They noted that "one important recent change in ARMIS accounting does affect the change from period to period in relationships among ARMIS categories. Effective July 2001, the FCC froze its separation allocations factors at the

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[24] *Id.* at n.49.

2000 level. Hence, changes in traffic, demand or relative use (including shifts toward more intensive use of data facilities) no longer affect the assignment of costs or investment to ARMIS categories."[25] One example of this is the tremendous growth in DSL service that has occurred since 2000, but which is not reflected in special access expenses and investments in ARMIS due to the separations freeze. This freeze results in ARMIS data essentially ignoring the over 1 million customers who currently subscribe to BellSouth's DSL service, and the costs and investments necessary to provide that service.

Finally, Drs. Taylor and Banerjee identified the overarching problem with the use of ARMIS data, that it diverts attention from what should be the real issue:

> What should matter most in any investigation of ILEC performance with respect to their access services is whether (1) competition of sufficient quality and quantity is occurring for the services in question and (2) prices of those services are being set and sustained at supra-competitive levels. Since the answer is "yes" to the first question and "no" to the second, it does not matter in the least that an ILEC's accounting rate of return—even one contrived for a specific service—exceeds some imagined level of acceptability.[26]

Put simply, the pertinent questions can only be addressed by assessing the competitive market, not by drawing an exceedingly broad conclusion based upon a very narrow use of ARMIS data.

Despite the announced intention to use ARMIS data, the *NPRM* also invites parties to suggest ways to repair the "possible impact of cost allocations during the price cap period of regulation,"[27] by taking steps such as removing from the data investments

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25 *Id.* ¶ 15.

26 *Id.* ¶ 16.

27 *NPRM*, 20 FCC Rcd at 2006, ¶ 29.

and expenses that are not directly assignable, and making calculations based on the resulting, adjusted data. BellSouth again submits that the appropriate course of action is not to start with a patently flawed way of evaluating special access prices (which ARMIS certainly is) and trying to fix those flaws. Instead, the better course of action, and the course of action more consistent with reasoned decision-making, would be for the Commission to undertake the examination of competition that the Commission contemplated when the CALLS plan began.

Moreover, the fact that the inquiry premised on the use of ARMIS data is so limited is a problem in itself. The *NPRM* proposes to use ARMIS data to compare the growth in demand for LEC access services to growth in LEC expenses and investments related to these services. However, LEC demand growth considered in a vacuum is meaningless. The analysis of the special access market in BellSouth's region performed by RHK Associates (described in greater detail below)[28] demonstrates that, while BellSouth is experiencing an increase in the demand for its special access services, the overall market demand for these same services is increasing at an even more rapid rate. In other words, there is an increase in the number of special access services BellSouth provides, but BellSouth's competitors are enjoying an even greater increase. Thus, BellSouth's share of the market is decreasing.

This point illustrates that, even if the *NPRM*'s conclusion about the increase in demand for LEC access services is correct, this observation is of little use. The failure to consider the demand in the entire competitive market renders any conclusions about the

[28] See Attachment 6.

demand trend for LEC services, even if they were reliable, an inadequate basis to develop a rational approach to the regulation (or deregulation) of special access service pricing.

For all of these reasons, rather than attempting to adapt or modify ARMIS data to develop some surrogate for a meaningful assessment of the market, the Commission should do as it stated that it intended to do in the *CALLS Order*. The Commission should assess the level of competition in the market and use this assessment, not to determine the form that continued pricing flexibility should take, but whether such regulation is warranted in this competitive market. Upon doing so, BellSouth submits that the facts will clearly show that the market for special access services is robustly competitive, and that continued price cap regulation is unnecessary.

III. THE SPECIAL ACCESS SERVICES MARKET IS ROBUSTLY COMPETITIVE

As the *NPRM* correctly notes, there are a number of ways to assess competition, including analyzing pricing trends over time and analyzing the LEC's market share.[29] BellSouth submits below the results of both types of analysis. BellSouth also has provided information to show that its special access revenue per unit has decreased considerably during the life of pricing flexibility. Each of these analyses prompts the conclusion that competition in the special access market is substantial and growing.

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[29] *NPRM*, 20 FCC Rcd at 2019-20, 2027-28, ¶¶ 73-77, 103-07.

A. BellSouth's Prices for Special Access Services Have Not Substantially Increased

As to the use of pricing trends as an indication of competition, the *NPRM* states that, "if a market is (or is presumed to be) competitive *ex ante*, the level of competition can be assessed by determining whether there have been *substantial* and *sustained* pricing increases."[30] Although the *NPRM* posits this test in the limited context of whether pricing flexibility should continue in its present form, it is, nevertheless, identified as a valid indication of whether competition exists. The premise underlying this test is that a provider that enjoys the freedom to set and maintain prices at supra-competitive levels does not face effective competition, because competition would not allow these substantial price increases to remain in effect for a sustained period of time.

Applying this test to special access prices in the areas in which pricing flexibility has been granted reflects that there have been little or no price increases over the last four years. Attachment 1 hereto provides a breakdown of the tariffed prices that BellSouth has applied for DS1 and DS3 level special access service from January 2001 to the present in MSAs to which pricing flexibility applies.[31] For the purposes of the analysis in Attachment 1, BellSouth has assumed an illustrative special access service that is composed of a local channel from the carrier's point of presence to a serving wire center, an interoffice facility to the end office (to which both fixed and per mile charges are

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30 *Id.* at 2019, ¶ 73 (citation omitted).

31 Attachment 1 shows the prices at each time that updated tariffs for access services were filed during this time period.

applied),[32] and another local channel that runs from the end office to the customer premises.

BellSouth selected this illustrative service arrangement because it was used by AT&T in its filings in the Petition for Rulemaking.[33] BellSouth notes, however, that this illustrative arrangement will yield a higher total price than would occur under a more realistic serving arrangement. Traffic from the serving wire center to the carrier's POP is almost always aggregated, then carried on a higher capacity circuit such as a DS3. Consequently, more than 95% of the DS1 special access arrangements have only one DS1 local channel. Also, carriers frequently provide their own entrance facilities rather than purchasing a local channel. Thus, the true price carriers/customers pay for their actual special access arrangements will be less. Nevertheless, BellSouth used this illustrative example to arrive at the highest price that any purchaser of special access services is likely to pay.

To price this illustrative service arrangement, BellSouth began by reviewing the rates for month-to-month ("MTM") service. This form of service has the highest provisioning costs and the highest rates. The tariffed rates for MTM service during this period reflect that for DS1 level service in zone 1,[34] the rate has been increased one time, in November of 2001, by approximately eight percent (from $555 per month to $601 per month). For zone 2, the results for this time period are exactly the same: the MTM rate

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32 A 10 mile interoffice channel is assumed.

33 *See* Letter from Patrick H. Merrick, Esq., Director – Regulatory Affairs, AT&T Federal Government Affairs, to Marlene H. Dortch, Secretary, FCC, RM Docket No. 10593, WC Docket No. 04-313 & CC Docket No. 01-338 (Oct. 20, 2004).

34 For a definition of density zones, see 47 C.F.R. § 69.123.

has risen eight percent (from $602 to $650). For zone 3, there was also a single increase of approximately eight percent (from $621 to $670).

For DS3 level service, the pricing trend is similar. For example, in Zone 1, during this more than four year period, there was a single price increase on November 1, 2001, from $7,490 to $8,180, an increase of approximately 9%.[35] Thus, for a customer purchasing this illustrative service arrangement on a month-to-month basis, the rate has risen by either eight or nine percent over the four and a half year period from January 2001 to the present. This amounts to an annual increase in the range of 1.77% to 2%, less than the rate of inflation.[36] This evaluation of the most expensive possible form of special access shows that, although there was a slight price increase, it cannot reasonably be classified as "substantial."

Moreover, the tariffed MTM rates for these services do not represent the prices typically paid by customers purchasing BellSouth's special access services. Instead, there are numerous discounts available to carriers and customers based both on the duration of their commitment to purchase services and the volume of service purchased. For example, 92% of DS1 revenues are attributable to services that are discounted from BellSouth's Area Commitment Plan ("ACP"), which provides discounts from the MTM rate when customers contract to buy BellSouth services for longer time periods.

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[35] For DS3 level service, the price differences between Zones 1, 2 and 3 were minimal during the time period in question. Accordingly, all DS3 prices referred to in this discussion are for zone 1.

[36] The total inflation rate from January 2001 to April 2005 (latest available data) is 11.14%, or an average annual rate of 2.57% ; *see* http://inflationdata.com/Inflation/Inflation_Rate/InflationCalculator.asp.

Similarly, approximately 75% of DS3 revenues are attributable to services to which a comparable term discount, the Transport Payment Plan ("TPP"), is applied. Given this, a realistic assessment of special access rates must take these discounts into consideration.

Attachment 1 also reflects that for both DS1 and DS3 level services purchased since 2001, there have been no price increases for services purchased under term agreements, i.e., when the purchaser agrees to a commitment of longer than a month. For DS1 services (zone 1), the monthly rate for 24-48 months has remained constant at $422 for the last four years; the monthly rate for terms of 49-72 months has remained unchanged at $391 per month. For zone 2, the DS1 rates have remained at $467 per month (24-48 month terms), and $436 per month (49-72 month term). For zone 3, the rates have remained at $492 per month (24-48 month terms) and $471 per month (49-72 month terms). For DS3 service, the monthly rates have remained at prices ranging from $5,805 (for a term of 12-36 months) to $4,575 (for a term of 73-96 months).

These rates are noteworthy for two reasons: First, they show that there has been no increase in the rates under term plans in the past four years, i.e., during the time that pricing flexibility has been in effect for BellSouth. This means that, when inflation is taken into account, customers currently pay less in real dollars for special access services purchased under the term plan than they did four years ago. Two, they reflect the substantial discounts that are available to purchasers of these services. For example, for DS1 service, contracting for a service term allows the customers to obtain a discount of

up to 35% from the MTM rate for the service.[37] For DS3 service, a discount of up to 44% is available when the customer chooses to purchase service for a term longer than a month.[38]

Further, additional discounts are available. BellSouth offers discounts for DS1 and DS3 service when the customer commits to a certain term and also purchases a certain volume of services. Attachment 2 hereto sets forth the available discounts for both DS1 and DS3 services. This discount plan, the Transport Savings Plan ("TSP")[39] provides discounts for purchases of both DS1 and DS3 level services based on the following standards:

	TERM		
Volume Purchased	Y1	Y2	Y3
$3M to $10M	1%	1.5%	2%
$10M to $100M	2%	3%	4%
$300-$500M	4.5%	6%	7%

Thus, the discounts available for DS1 service (zone 1) are as much as 40% off of the MTM rate.[40] The comparable discounts for DS3 service are as much as 48%, which means that customers having the largest discount pay only 52% of the price of an

[37] For zone 1, the rate for DS1 service for a term of 49-72 months is $391, 65% of the MTM rate of $601.

[38] For a term of 73-96 months, the DS3 rate is $4,575, 56% of the MTM rate of $8,180.

[39] The TSP plan was recently replaced by the Transport Advantage Plan ("TAP"), which provides discounts comparable to those under the TSP plan.

[40] The Year 3 rate for large users of DS1 services is $363.63 per month, 60% of the MTM rate of $601.00 (a 40% discount).

undiscounted DS3 purchased on a month-to-month basis.[41] Further, BellSouth has put in place during the last four years plans with modified eligibility requirements, which has allowed more purchasers to qualify for the discounts now than four years ago, thereby effectively decreasing the rates they pay.[42]

The current pricing structure is based upon a rational approach to prices that are set at levels one would anticipate when providers and customers are free to negotiate in a competitive environment. In other words, where pricing flexibility exists, the marketplace and customer choice have replaced regulators as the determinants of the terms and conditions of special access services. If a customer wishes to obtain service with no contractual commitment whatsoever, then it may do so by purchasing month-to-month service and paying a higher price (albeit one that has increased only slightly over the last four years). A customer willing to commit to a longer term and/or to a certain volume of purchased services receives substantial discounts. Customers have also negotiated service level agreements with BellSouth that guarantee service performance. In other words, pricing flexibility has allowed customers to obtain packages of services that balance price and performance in a way that meets the customers' needs. The proof of this statement resides in the fact that over 90% of purchasers of DS1 service and almost 75% of DS3 customers choose to obtain discounts through term or volume and term agreements.

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41 The Year 3 rate for large users of DS3 services having a 73-96 month contract term is $4,254.75, 52% of the undiscounted MTM rate of $8,180.00.

42 On June 30, 2001, BellSouth modified its Fast Packet Savings Plan to reduce the commitment level required for eligibility from $2 million to $750,000.

B. BellSouth's Per Unit Revenue For Special Access Services Is Decreasing

The existence of competition in the special access market is also manifested in the demonstrable decrease in special access services that are being purchased from BellSouth. Currently, a potential purchaser of special access services has numerous alternatives: (1) purchasing special access services from BellSouth, (2) purchasing UNEs in those areas where impairment exists, (3) purchasing facilities from providers other than BellSouth, (4) building its own facilities or (5) utilizing the almost endless combinations of these alternatives. The fact that potential users of BellSouth's special access services are increasingly choosing other options is demonstrated by the downward trend in BellSouth's revenue per unit for special access services.

To demonstrate this trend, BellSouth performed an analysis (which is attached hereto as Attachment 3) in which it took the total special access services revenue, and divided it by the number of units sold to arrive at the revenue per unit for these services (i.e., the equivalent of the price paid per unit).[43] This analysis shows that for DS1 service, the average monthly revenue per circuit was $377.85 at the end of 2001. For each of the next three years, the per unit revenue dropped, first to $334.08 at year end 2002, then to $316.87 in 2003, and finally, to $313.85 in 2004. Thus, during this time period, the revenue from DS1 level special access services declined by 17 percent, i.e., the current monthly revenue per unit is 83% of the per unit revenue three years earlier.

[43] For purposes of this analysis, BellSouth used the revenue obtained from both MTM service and service purchased under term plans. These figures, however, do not include the discounts from the volume term plans (TSP discount for DS1; ACP discount for DS3). Thus, these figures overstate the actual revenue.

In December of 2001, the average per unit revenue for DS3 service was $2,048.21 per month. By year end 2002, per unit revenue declined to $1,502.89, then to $1,419.38 in December of 2003, and finally to $1,364.24 by the end of 2004. Over this three year period, monthly DS3 revenues declined by a third, i.e., the December 2004 per unit revenue was only two-thirds of the per unit revenue level at year end 2001.

BellSouth also analyzed the actual purchases of four of its special access customers. The results (reflected as revenue per unit) are attached hereto as Confidential Attachment 4. Without identifying the carriers in the non-confidential portion of this filing, BellSouth will note that these four carriers are of different sizes, and they buy differing amounts of BellSouth special access services. Also, BellSouth believes that these carriers employ different network architectures, and, therefore, use BellSouth's special access services in different ways. Still, there is a general downward trend for each of the four, i.e., the revenue per unit that BellSouth received from these carriers in year four is less than the corresponding revenue figure for year one.

BellSouth also analyzed the total revenue from both DS1 and DS3 level services after all discounts are applied (both term discounts and volume and term discounts). The result (which is expressed in revenue per DS1 equivalents) is attached hereto as Attachment 5. These results also reflect a downward trend, from $326.18 per month in December 2001, to $270.61 for year end 2002, to $268.91 for 2003, and finally to $253.63 in December 2004. This analysis of total revenue reflects a 23% decrease over the past three years.

Overall, this downward trend in revenue reflects several changes in the special access services purchased over the last four years. No doubt some portion of the revenue decrease is attributable to price decreases on a per unit basis as customers take full advantage of available discounts. However, this downward trend also is evidence of increasing competition in the special access market. The time is over when most carriers utilized BellSouth's network to carry traffic the entire route from their customers' premises to their POP. Instead, carriers aggregate as much traffic as possible, whenever possible, to utilize large capacity circuits. Doing so not only makes the transport of this traffic more efficient, it makes self-provisioning of large point-to-point circuits more economically feasible. As this occurs, customers increasingly purchase BellSouth's special access facilities in the limited circumstances in which it is more economical to do so instead of self provisioning or purchasing from other carriers that have designed their networks specifically to carry high volumes of traffic point-to-point. In some cases, carriers purchase BellSouth's special access services for cross-connect purposes only, which obviously results in a substantial decrease in the revenue attributable to special access.

In sum, customers continue to use portions of BellSouth's network, but as they increasingly make arrangements to replace the special access services that have historically produced the greatest revenue (such as transport), the per unit revenue for BellSouth's special access service continues to decline.

C. An Analysis of BellSouth's Market Share Confirms The Existence Of Substantial Competition Throughout BellSouth's Region

The *NPRM* identifies the analysis of LEC market share as a means to determine the level of competition in a market, and invites parties to submit such an analysis for special access services. In response to this request, BellSouth submits a market share analysis of the wholesale market for special access services that was performed by RHK Associates ("RHK"), a copy of which is attached hereto as Attachment 6.[44] This Attachment includes a Declaration by Stephanie Boyles Ph.D., RHK's Managing Director of Service Provider Advisory Services. Dr. Boyles' Declaration details the methodology used by RHK to perform the market share analysis. Attached as Exhibit A to the Declaration is a presentation that shows the results of RHK's analysis.

In this analysis, RHK evaluated the respective market shares of BellSouth and alternate access vendors (AAVs)[45] for two types of special access service. One, RHK analyzed "tail circuits," which are defined as circuits that run between the premises of the end user and the BellSouth end office. Two, RHK analyzed Interoffice Facilities ("IOF"), the facilities that run from the end office to the carrier's point of presence ("POP"), or interconnection point. RHK also aggregated the results of these two analyses into a combined market share that applies to all special access services.

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[44] The market share analysis focused on the competitive alternatives that would be available to an IXC purchasing an access service or the equivalent to provide a retail service to an end user. Thus, the competitive alternatives considered were (1) purchasing tariffed BellSouth access services, (2) purchasing UNEs, and (3) purchasing service from an alternative vendor. Another alternative would be for the IXC to build its own access facilities. To the extent this occurs, self provisioning is treated in the RHK analysis in the same way as a purchase from an alternate access vendor ("AAV").

[45] The terms alternate access vendor and AAV are used to refer to any competitor of BellSouth that has a share of the special access market, including CLECs and IXCs.

The respective market shares are stated in three ways. First, market shares are stated on a regional basis, which reflects all areas that BellSouth serves in its nine-state region. By assessing market share on a regional basis, the RHK study reflects all competition in the area BellSouth serves, including both the areas in which Phase II pricing flexibility has been granted and the areas in which price cap regulation continues to apply. Second, the results are stated separately for the 20 largest MSAs in the nine states in BellSouth's region, all of which are subject to pricing flexibility. Third, the results are provided by state for the areas outside of the 20 largest MSAs. For example, in Georgia, the two MSAs on the list of the 20 largest are Atlanta and Augusta. Therefore, the results are also stated for areas in Georgia other than these two MSAs.

The most difficult part of the analysis involved selecting a basis to assess the respective market shares of BellSouth and AAVs. The *NPRM* mentions several possible choices of measurement, including revenues, network capacity and volume of traffic.[46] The *NPRM* also suggested that parties select a measurement and provide a justification of their choice.[47] BellSouth, however, took a different approach. Rather than requesting that RHK perform a single analysis, BellSouth requested that RHK adapt its methodology to analyze market share in as many ways as possible. Consistent with this approach, the RHK report includes analysis on the basis of the following measures of market share: (1) product units sold, (2) the total capacity of all services provided, expressed in DS1 equivalents, and (3) the total revenue for the services provided. BellSouth chose to use

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46 *NPRM*, 20 FCC Rcd at 2027-28, ¶ 103.

47 *Id.*

three different types of analysis because there are advantages and disadvantages to each approach. However, the use of three methodologies allows for a comparison, and, if the three methods lead to consistent results, a validation of these results.

The first approach entailed an assessment of the market based on the total number of DS1, DS3 and OCn circuits sold. This analysis proved to be relatively straightforward for tail circuits. Since a tail circuit travels a point-to-point route, a customer can purchase a specific product at the desired speed. The relative simplicity of a tail circuit allowed the type of like-to-like comparison that must be made for a service specific analysis. For IOF facilities, however, both the variety of services purchased and the complexity with which these services are combined prohibits a valid comparison based on service type. In many instances, the IOF route runs through numerous central offices. Thus, there may be two "links" that make up the route or a much greater number of links. For each of these "links," the purchasing carrier may choose one of several BellSouth offerings, an offering of a competitive provider, or it may choose to build its own facilities. For example, a carrier may purchase DS1 circuits from the end office to an intermediate office, then utilize multiplexing so that the traffic can be carried on a higher capacity circuit that goes to the next central office, then utilize a collocation arrangement to connect to its own facilities.

Even when the carrier purchases the entire route from BellSouth, the use of multiplexing makes a determination of a speed-specific market share next to impossible. Assume an end user orders a DS1 from a carrier. The carrier could order a DS1 tail circuit to the end user's end office, and also order a DS1 from the end office to a hub

office where the traffic is multiplexed onto a DS3 facility, which runs to the serving wire center of the carrier's POP. The market is one circuit, but billing records would show one DS1 IOF and one DS3 IOF as well as another local channel (or tail circuit) from the serving wire center to the carrier's POP. For this reason, it is not possible to categorize the facilities along a given IOF route as DS1, DS3 or OCn.

This difficulty does not make estimation of competitiveness impossible, just less precise. BellSouth does not believe that any party would contend that there is less competition to provide interoffice facilities than tail circuits. Thus, the amount of competition in the sub-market for tail circuits provides a lower bound for competition in the IOF market. Moreover, since IOF circuits can not be compared on a per unit basis, RHK also assessed market share based on two different approaches identified in the *NPRM*, capacity-based and revenue-based. As explained in the Declaration of Dr. Boyles, the capacity-based approach involves taking the total circuits sold, determining the capacity of each circuit, then adding the capacity per circuit to reach the total market capacity. The revenue-based analysis involves determining the price per circuit and then totaling all circuit prices to determine the total market revenue.

Although both the capacity-based and revenue-based approaches provide useful information, the capacity-based is likely the more reliable of the two. A market share based on revenue is unlikely to contain only like-to-like comparisons. This is partially the case because BellSouth and its competitors employ different pricing structures. Also, differences in per unit revenues between carriers can be attributed to the carriers offering products with different service levels. For example, one would expect an access service

provided with a service quality guarantee program (which BellSouth has) to have a higher price than a service that had no such guarantee.

The availability of UNEs can distort the comparison as well. For example, assume an IXC has 100 customers, each of whom has identical special access needs. If the IXC serves 50% of its customers by utilizing an AAV's facilities, with rates identical to the incumbent, one would calculate a fifty percent wholesale market share for the AAV using either revenue or demand as a measure. If, on the other hand, the IXC serves the same customers with UNEs (at, for example, half the tariffed special access rate) one would calculate a 33% market share (based on revenue) for the IXC/UNE competitor, even though clearly the incumbent has lost 50% of the market. Nevertheless, BellSouth has included the revenue analysis primarily because it may provide validation of the results of using the other methods.

Applying these three analytic frameworks leads to a clear indication that competition exists in all segments of the special access market. For tail circuits, RHK compared the number of DS1, DS3 and OCn circuits provided by BellSouth, provided by alternate access vendors,[48] and provided by BellSouth's competitors using UNEs.

The results of this analysis are as follow:

DS1	BST	59%
	UNE	30%
	AAV	11%

[48] In this context, the term alternate access vendor ("AAV") refers to any competitor that provides service without using BellSouth facilities.

DS3	BST	44%
	UNE	1%
	AAV	55%
OCN	BST	21%
	UNE	0%
	AAV	79%[49]

These results make clear the fact that alternate vendors of special access services provide a substantial percentage of all services sold in the tail circuit segment of the special access market. This finding is especially noteworthy because some parties have claimed in past proceedings that there is almost no competition for the provision of tail circuits, and that this segment of the market should be subject to monopoly regulation. To the contrary, for OCn level circuits, AAVs dominate the market with a 79% market share, compared to BellSouth's 21% market share. For DS3 level circuits, the AAV market share is not as great, but AAVs still control 55% of the market by using facilities-based competition. It is only at the DS1 level that BellSouth has a higher per unit share. However, even for these circuits, competitors serve 11% of the market with their own facilities, and serve an additional 30% of the market by the use of UNEs, for a total market share of 41%.

[49] Attachment 6, Exh. # A, at 6, 8 & 10.

These results clearly demonstrate that there is a healthy competitive market for tail circuit services. The service-specific breakdown of this competition also provides insight into the decisions that competitors make in deciding how to enter the market. For OCn level services, AAVs that provide purely facilities-based competition dominate the market. For DS3 level service, although UNEs are available in various markets, competitors only use them to serve 1% of the end users. At the same time, competitors that either build their own facilities or obtain them from providers other than BellSouth serve 55% of the market. These results reflect the fact that a competitor that has sufficient traffic to justify building facilities will do so.

The capacity-based and revenue-based analyses reinforce the conclusion that there is substantial competition in the tail circuit sub-market. Specifically, under the capacity based market share approach, BellSouth has 44% of the market, AAVs serve 46% of the market, and 10% of the market is served by BellSouth's competitors that utilize UNEs. Under the revenue- based approach, BellSouth has 63% of the market, AAVs serve 17% of the market, and competitors that utilize UNEs have 20% of the market.[50] Thus, under these two methods, BellSouth's competitors have between 37% and 56% of the total market for tail circuits.

As to interoffice facilities, the only conclusion that can be drawn, regardless of the mode of analysis, is that BellSouth's competitors dominate the market. The revenue-based analysis reveals that AAVs have 73% of the market, as compared to 12% for BellSouth. Another 15% of customers are served by competitors that use UNEs. Thus,

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[50] *Id.* at 2.

through a combination of UNEs and facilities-based competition, BellSouth's competitors have 88% of the market. The capacity-based analysis reflects even greater competitive activity. On a capacity-basis (i.e., DS1 equivalents), AAVs have 87% of the market, 1% of the market is attributable to competitive service using UNEs, and BellSouth has only 12% of the market.

These results demonstrate that at least one widely-held perception is correct: there is more competition to provide IOF circuits than tail circuits. There is currently a fairly even competitive struggle between BellSouth and its competitors to provide tail circuits. For IOF, however, BellSouth currently has very little of the market by <u>any</u> reasonable measure. Given this, the salient question is not whether there is sufficient competition to control prices. Instead, the real question is whether there is any justification to impose regulatory constraints (especially restrictive price regulation) on the incumbent in a market that is so dominated by non-incumbent competitors. BellSouth submits that the only rational answer to this question is "no."

RHK also combined the results for tail circuits and IOF circuits to develop a total market share under each of the two methods. On a revenue basis, BellSouth has 41% of the total market, 18% of the market is attributable to competitors using UNEs, and AAVs have 41% of the market. On a capacity-basis, BellSouth has 17% of the market, service provided by competitors using UNEs represents 2%, and AAVs have 82% of the market share.

Part of the reason that BellSouth's competitors dominate the market under the capacity-based approach is that they have chosen to concentrate on building out larger

circuits, which have a simpler, more easily managed network architecture, and greater potential for profit. Obviously, a LEC network composed of very large circuits will necessarily have a great deal of capacity. Still, this massive AAV market share should put to rest once and for all the claim that facilities-based competition for special access services is minimal or incidental.

RHK also analyzed the growth in the market for special access services over the past year. The results of this analysis, by service type, are as follow:

	BST Growth	Total Market Growth
DS1	4.0%	10.1%
DS3	33.5%	35%
OCn	26.6%	35.3%[51]

These figures demonstrate that 1) the market for special access services is growing; 2) BellSouth's growth is less than the growth of the overall market, which means that the market share of competitors is increasing.

The growth figures are also noteworthy because the *NPRM* premises the tentative decision to revert to the strict price controls of the past on the conclusion that demand for LEC special access services is increasing.[52] Obviously, BellSouth takes issue with the use of ARMIS data to reach this conclusion. Looking only at demand increases results in a skewed perspective of the market. When a more comprehensive view is taken, it becomes clear that, even though BellSouth's sales of special access services are

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51 *Id.* at 5.

52 *NPRM*, 20 FCC Rcd at 2006, ¶ 29

increasing, the general market growth is even greater. As a result, BellSouth is losing relative market share. Thus, when one considers the totality of competition in the market place (and not just an interpretation of ARMIS data), it becomes obvious that restrictive price controls have no place in the current competitive market.

The RHK report also breaks down the product-specific annual growth in tail circuits to geographic markets. The results are as follow:

DS1 Growth

	Region	Top 8 Metros	All Other Metros
BST Special Access	4%	3.8%	4.2%
Total Market	10.1%	11.2%	8.3%[53]

DS3 Growth

	Region	Top 8 Metros	All other Metros
BST Special Access	33.5%	38.2%	27.2%
Total Market	35.4%	36.6%	33.0%[54]

OCn Growth

	Region	Top 8 Metros	All Other Metros
BST Special Access	26.6%	26.1%	27.5%
Total Market	35.4%	36.6%	33%[55]

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53 Attachment 6, Exh. A at 7.

54 *Id.* at 9.

Thus, in the sub-market for DS1 tail circuits (which has the least growth of the three services examined), the total market growth rate is more than twice the growth rate of BellSouth's services in the region and in the top eight metros, as well as almost twice the growth rate in the areas outside of the top eight metros. For DS3 service, BellSouth has 1.6% more growth than the total market in the eight largest MSAs, but has less growth in all other areas and in the entire region. For OCn level tail circuits, the total market growth is significantly greater than the BellSouth services growth in every geographic breakdown. Again, the data can only lead to the conclusion that BellSouth's growth is less than the general market growth.

Finally, comparing the two capacity-based and revenue-based methods above, there is an obvious difference in relative market share as measured by the two, i.e., it would appear that BellSouth obtains more revenue on a per unit basis than its competitors. As mentioned previously, this apparent disparity is likely due to some of the factors that make the revenue-based comparison less than optimum, such as the difficulty in comparing prices for truly comparable services. These results are likely also due in part to the fact that BellSouth's competitors dominate the market for high capacity services, while BellSouth provides a higher percentage of low capacity services.

Also, differences in per unit revenue are likely attributable to the fact that BellSouth provides access services with the ubiquitous network that it must maintain to provide a full range of other services, while BellSouth's competitors are free to serve

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[55] *Id.* at 11.

only customers that can be served profitably, and to only construct point-to-point facilities when it is economically feasible to do so. Despite all this, some parties will undoubtedly claim that BellSouth's per unit revenue numbers are the result of BellSouth having a higher profit margin than its competitors for comparable services. Although BellSouth disagrees with this conclusion, even if it were true, it provides no basis to impose pricing constraints on BellSouth. It is absolutely clear that BellSouth's competitors have ample facilities in place to compete in the special access services market. Therefore, if BellSouth's higher revenue per unit reflects a higher profit margin, then these profits must be viewed as being at considerable risk, which is precisely as it should be in a competitive market.

As discussed above, RHK also conducted an analysis of the respective market shares of BellSouth and its competitors that focused on specific MSAs and states. In this analysis, RHK determined the market share, both by revenue and capacity, for combined access services in each of the 20 largest MSAs in BellSouth's territory. RHK also performed a market share analysis, again by both revenue and capacity, of all areas in each of the nine states in BellSouth's region that are outside of the 20 largest MSAs. This analysis establishes that competitors of BellSouth have a significant presence in every area studied.

In fact, in some areas, AAVs dominate the market. In Greenville, South Carolina, for example, BellSouth market share is 28% of the market (on a capacity-basis). In other words, AAVs utilizing both non-BellSouth facilities and UNEs have 72% of the market.

Further, under the capacity-based analysis, BellSouth's market share is 50% or less in 18 of the 29 areas, and 60% or less in every single area.[56]

Further, BellSouth's competitors have a substantial competitive presence in every area studied. Considering all 29 areas and both methods of determining market share, the smallest market share by any alternate vendor is 12% (on a revenue-basis) in Augusta, Georgia and Birmingham, Alabama.[57] At the same time, competitors in the Augusta MSA also serve 13% of the market with UNEs obtained from BellSouth, for a total market share of 25%. Similarly, in the Birmingham MSA, BellSouth's competitors serve 10% of the market by purchasing UNEs and have a total market share of 22%.[58] Thus, even in the market in which BellSouth's competitors have the smallest facilities-based presence (by any measure), they still serve 22% of the market.

The results are similar if one looks at the lowest market share based on a combination of facilities-based and UNE-based offerings, i.e., the result is still a significant market share. Specifically, the lowest combined share (on a revenue-basis) is 20%, which occurs in all areas of Georgia other than Atlanta and Augusta. The next lowest combined market share is 23% in BellSouth's service area in Florida (which does not include Tampa/St. Petersburg), outside of Miami-Ft. Lauderdale, Jacksonville, and Orlando.

Although the MSA-specific results vary somewhat from one analysis to the other, it is clear under both approaches that there is substantial competition. Moreover, this

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56 *Id.* at 3.

57 *Id.*

58 *Id.*

competition is present throughout BellSouth's territory. Attachment 6, Exhibit 1, page 4, includes the result of combining the two market share measurements[59] to arrive at a blended market share for BellSouth in each of the 29 areas. The result is that BellSouth has the largest market share in the areas of Georgia outside of Atlanta and Augusta (72%) and the lowest market share in Greenville, South Carolina (37%). In the remaining 27 areas, BellSouth's market share is between 37% and 72%, which means that in every one of the 29 areas studied, BellSouth's competitors have between 28% and 63% of the market. Thus, this analysis reflects the fact that not only are alternative providers of special access services active throughout BellSouth's region, they have, to date, achieved substantial market shares in markets of all sizes within BellSouth's service area.

Finally, the analysis also reflects the fact that, although there is more competition in the more densely populated MSAs, the difference in the amount of competition between large MSAs and less populated areas is actually quite small. For example, under the blended analysis, BellSouth has a 58% market share in Charlotte, North Carolina (the state's largest city), but only a 60% market share in all other areas of the state. Likewise, BellSouth has 49% of the market in Louisville, Kentucky (the only city in Kentucky among the 20 largest MSAs), and 59% of the market in all remaining areas of Kentucky. Also, in Memphis (the largest city in Tennessee), BellSouth has a 47% blended market share, and only a 56% share in other areas in Tennessee. In one state, Alabama, competitive penetration is even greater outside of the state's largest MSA. Specifically,

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59 The formula used was revenue share plus capacity share divided by two.

BellSouth has a 69% market share in Birmingham, but only has 64% of the market share in the remainder of the state.

Considering the RHK market share analysis in its totality prompts the conclusion that BellSouth's competitors are using alternative networks to compete with BellSouth, that they have obtained very large market shares in some areas, and they have a substantial presence throughout BellSouth's region. Given this evidence, there is absolutely no question but that the market for special access services in BellSouth's region is robustly competitive and becoming more so all the time.

IV. THERE IS NO ECONOMICALLY RATIONAL BASIS TO APPLY PRICE REGULATION TO SPECIAL ACCESS SERVICES

In previous sections of these Comments, BellSouth has set forth the bases for a conclusion that competition in the market for special access services is robust and constantly increasing. In other words, competition is more than adequate to constrain prices. The Commission should also consider whether price regulation of special access services is appropriate from an economic standpoint. Attached as Attachment 7 is the Declaration by Harold Furchtgott-Roth and Professor Jerry Hausman, which provides an economic perspective on the *NPRM* and its tentative conclusions. Drs. Furchtgott-Roth and Hausman begin with the following general observation regarding price regulation:

> Even if the FCC were to find competition less than perfect in all markets for special access services, it does not rationally follow that price regulation should continue or be expanded. If the presence of less than perfect competition in one market necessarily led the government to impose price regulation in each related market, large portions of the American economy would have price regulation. The empirical observation, however, is that price regulation is the exception rather than

> the rule in the United States not because all markets are perfectly competitive but because price regulation is an extraordinarily invasive remedy often more harmful than the underlying malady.[60]

With this perspective as a starting point, Drs. Furchtgott-Roth and Hausman examine pricing regulation in light of the fundamental "premise that any form of price regulation adopted by the FCC should be economically rational: the economic welfare gains from such regulation should be predictably greater than the welfare losses."[61] Applying this standard, they conclude that price regulation is not an economically rational regulatory mechanism to apply to special access services. This conclusion is based on both their assessment of price regulation and the nature of special access services. As they state,

> Price regulation cannot possibly be effective unless certain conditions are met. We find that special access services do not meet any, much less all, of the standard characteristics that economists would use to demonstrate a rational basis for price regulation. Indeed, distortions on investment and other harms are likely to outweigh any conceivable benefits from price regulation.[62]

In their assessment of price regulation, Drs. Furchtgott-Roth and Hausman state that there is little support in the economic literature for price regulation, including price caps, except in the very narrow circumstance of near monopoly conditions with declining marginal costs, a circumstance that is not likely to occur in the provision of special access services. Further, they note that many economists doubt that the use of price regulation

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60 Declaration of Drs. Furchgott-Roth and Hausman at 5.

61 *Id.* at 7-8.

62 *Id.* at 6.

ultimately lowers prices.[63] They also note that the possibility of harm to consumers from price regulation is well accepted by economists.[64]

The fundamental problem with price regulation is that if prices are set too high, then this will lead to excess supply and distorted investments, and will artificially lower the number of consumers. If prices are set too low, then this will lead to shortages and distorted investments.[65] Thus, one of the principal difficulties with price regulation is that it can only function in a beneficial way if regulators are successful in determining precisely the correct price. For reasons that will be explained later, this is all but impossible to do for special access services.

Given "the many unsuccessful examples of price regulation in the 20th century," the use of price regulation in many regulated industries has been in a steady decline in the United States—and, in fact, throughout the world—for decades.[66] The Commission has followed this same trend of reducing price regulation for many years. "Although the FCC appears to have retained much of the same legal authority it once had to regulate strictly interstate and international rates, it has progressively lessened price regulation, including price regulation for special access services. Indeed, it is difficult to find counterexamples where the FCC in the past 30 years has decided to introduce or expand price regulation to a telecommunications service."[67]

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63 *Id.* at 9.

64 *Id.*

65 *Id.* at 9.

66 *Id.*

67 *Id.* at 9-10.

Moreover, the regulation of access rates began approximately 25 years ago at a time when AT&T had effective monopoly control of local access.[68] Over the past 25 years, market conditions have consistently evolved toward increased and more pervasive competitive offerings in the special access market.[69] Currently, publicly available information suggests the presence of competitive (CLEC) networks that offer service to business customers in practically every major metropolitan area.[70]

The absence of competitive alternatives is generally viewed as a prerequisite to price regulation, and there is no such absence in the special access market today. Drs. Furchtgott-Roth and Hausman conducted research that revealed "substantial entry, exit and consolidation among competitive special access providers providing fiber networks in metropolitan areas."[71] Specifically, they studied competition in MSAs in BellSouth's service area that are the sixth, seventy-third and one hundred-forty ninth largest nationally.[72] The results demonstrate (among other things) that CLECs offer facilities-based special access services in markets of all sizes, that CLEC consolidation does not necessarily decrease the available competitive facilities, and that CLECs offering special access services have substantially entered and exited specific geographic markets.[73] The Declaration also notes that LEC's face competition from providers of wireless service, including mobile data services, wireless internet access and fixed wireless services,

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68 *Id.* at 11.

69 *Id.* at 12.

70 *Id.* at 13-14.

71 *Id.* at 14.

72 *Id.* at 15.

73 *Id.* at 16.

which offer dedicated service that compete directly with wireline special access.[74] To summarize the competitive findings in the Declaration, "[p]rice regulation is premised on the absence of competitive alternatives. While that condition held for special access in 1983, it no longer holds today."[75]

Further, Drs. Furchtgott-Roth and Hausman demonstrate that even a small amount of competition makes price regulation unnecessary. Most costs associated with special access are fixed. "[M]arginal costs are only a small component."[76] For this reason and because "competition takes place at the margin, only a small proportion of the ILEC's customers need to defect to defeat [any] attempted price increase."[77] The Declaration provides a calculation that demonstrates that a five percent increase in price would prove unprofitable if there was a resulting loss of only six percent of the ILEC's customers. This fact, combined with the statutory prohibitions against discrimination (as well as those contained in the Commission's rules), are sufficient to constrain the LEC from raising prices. Further, as stated in the declaration:

> [I]n markets where CLECs provide competition to certain groups of customers, ILECs will find it necessary to meet the competitive prices of CLECs. These competitive prices will then prevail throughout the market because of non-discrimination provisions. Thus, CLECs do not need to be present in every part of a market for their competitive effect to be present throughout the market.[78]

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74 *Id.* at 16-17.

75 *Id.* at 17.

76 *Id.* at 32.

77 *Id.*

78 *Id.* at 37.

Aside from the question of whether the level of competition renders price regulation unnecessary (which it does), one must also consider the fact that price regulation is a particularly poor regulatory choice for special access services. As stated above, the potential benefits of price regulation only outweigh the potential harm if the Commission manages to set prices at precisely the correct level. However, special access service is a heterogeneous service in which each link of the service "can vary by capacity, speed, transmission technology, reliability and other factors.[79] The development of a regulatory framework to set prices for a service that may take many different forms, all of which can change so quickly, would be extremely difficult. "It is difficult enough to administer a price regulation for a single homogeneous service; it is far more difficult when the service has many different and changing characteristics."[80]

It is also extremely difficult to determine the "supply" of special access services because it is difficult to define precisely what constitutes a special access service. As stated in the Declaration, "special access services are heterogeneous, geographically specific, technologically evolving services offered jointly with other services on common facilities, [and which face] rapidly changing demand."[81] These characteristics of special access service are important to consider when contemplating the imposition of price regulation because the cost of providing access services depends on the cost structure of the network to deliver these services. Since the potential means of delivering the services are so diverse, it is difficult to extrapolate the cost of providing special access services.

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79 *Id.* at 17.

80 *Id.* at 17-18.

81 *Id.* at 26.

Further, the Commission does not have the necessary information to accurately measure the costs of providing special access service, and it would be difficult, if not impossible, to collect and correctly interpret this information.[82] Even if the Commission could determine the cost associated with the network utilized to provide special access services, it would still be extremely difficult to make any sort of non-arbitrary assignment of the cost of special access. These services are rarely offered over equipment that is separable from the equipment used to provide other services.[83] Moreover, "even if the FCC had an accurate empirical cost study for special access services at one point in time, the study would likely soon be obsolete."[84] All of these factors make the selection by the Commission of an accurate price for special access services virtually impossible.

Drs. Furchtgott-Roth and Hausman also conclude that demand for special access services would be extremely difficult to determine. This difficulty presents another insurmountable obstacle to the Commission's setting an accurate price for special access services. Economists utilize particular empirical techniques to determine which services are in a particular market and which services are not in that market. However, there are no comprehensive demand studies for special access services.[85] Further, it is difficult to come up with any viable service market definition, given the fact that DS1 and DS3 loops are sometimes used interchangeably, that UNEs are used subject to different rules than DS1 and DS3 service, and that the range of technologies available for competitive

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82 *Id.* at 28.

83 *Id.* at 27-28.

84 *Id.* at 28.

85 *Id.* at 30.

services are far greater than "just these two relatively low-capacity standards."[86] Given this, the Commission does not have available to it the sort of information that would be required to specifically define markets for special access services in the way that would be necessary to have a rational basis for price regulation. Further, even if markets could be properly defined, the administrative difficulty of imposing price regulation on a myriad of specifically defined markets would likely be unworkable.[87]

In addition, price regulation should be avoided because, even if it could be imposed in a rational manner, this form of regulation has the potential to distort "investments and offerings by both incumbent and competitive carriers."[88] As discussed at length in the Declaration, this potential distortion exists, in part, as the result of the transaction costs and uncertainty inherent in price regulation, and it exists even if the price cap regime includes pricing flexibility.[89]

Putting aside for a moment both the lack of empirical data upon which accurate prices could be set by the Commission and the substantial potential for market distortion, according to Drs. Furchtgott-Roth and Hausman, price regulation is still not appropriate unless the following five conditions are met:

1. Near monopoly with little or no chance of competitive entry.
2. Opportunity to exercise market power.
3. Failure of contracts.
4. Failure of other government remedies.

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86 *Id.*

87 *Id.*

88 *Id.* at 21.

89 *Id.* at 25-26.

5. Predictable regulatory environment.[90]

Based on analysis described in the Declaration, they conclude that "[n]one of these conditions holds throughout the United States, and none of these may hold for any particular special access service in any geographic market."[91] Thus, the conditions in which price regulation might even conceivably be appropriate are absent.

Finally, Drs. Furchtgott-Roth and Hausman point out that even if an ILEC were able to exercise market power in some abusive way, there are a variety of remedies available to address these abuses. This is important because, as they state, "[p]rice regulation is an extreme form of government intervention ," that should only be utilized when other forms of government intervention are inadequate to address the problem.[92] "The FCC has enforceable rules which limit the potential range of pricing of access services but which do not require rigid price regulation."[93] There are also a myriad of statutory obligations upon carriers that limit the types of offerings that a carrier may make, and that impose prohibitions against discrimination.[94] Further, "the FCC has even enforced under Section 201 the 'reasonableness' of access rates for carriers not covered by price regulation."[95] Thus, there are a variety of mechanisms that are available to address perceived abuses within the market, and there is no evidence that these

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90 *Id.* at 31.

91 *Id.*

92 *Id.* at 36.

93 *Id.*

94 *Id.*

95 *Id.* at 37.

mechanisms are inadequate to do so. Given this, there is no need to impose the comparatively harsher alternative of price regulation.

To summarize the conclusions of Drs. Furchtgott-Roth and Hausman, price regulation would only be appropriate under extremely narrow circumstances, and these circumstances do not exist in the current special access services market. Further, given the nature of special access, it is an especially poor candidate for price regulation. The imposition of continued price regulation (and certainly the expansion of this form of regulation) has the substantial potential to distort the market in ways that would be harmful, and price regulation provides very little prospect of serving any beneficial purpose. Again, the Commission has consistently moved away from strict price regulation over the past few decades, as have all regulated industries. A return to this restrictive form of regulation is not only unprecedented, it is not justifiable in the instant situation.

V. BELLSOUTH'S PROPOSAL: REMOVE SPECIAL ACCESS PRICING CONSTRAINTS THAT CURRENTLY APPLY TO LECS

Given the extensive competition in the special access market and the shortcomings of price regulation, BellSouth proposes that, as a transitional mechanism, the Commission remove all restrains on the LECs' pricing of special access services in all areas for a period of two years by granting Phase II pricing flexibility. At the end of this two-year period, these services should be completely deregulated.

For the reasons set forth previously, there is no rational basis for the Commission to continue to control prices for special access services in any geographic area, including

those in which there has been no pricing flexibility to date. By any reasonable standard, the market is competitive. BellSouth's prices have not increased in the substantial and sustained manner that was identified in the *NPRM* as being indicative of a lack of competition. There are many facilities-based competitors in the market, and the competitors of BellSouth in this market have made extraordinary competitive inroads. As discussed previously, in some of the sub-markets for special access services (such as high capacity services), BellSouth's competitors dominate the provision of these services. Even in those portions of the market in which BellSouth continues to have competitive success (such as DS1 special access services), competitors currently have almost one-half of the market. Further, as set forth in the Declaration of Drs. Furchtgott-Roth and Hausman, even if the market were not fully competitive, price regulation[96] is not appropriate for special access services.

In light of all of the above, it would certainly be justifiable to completely deregulate special access services at this time. BellSouth, however, only requests that the Commission take the substantially more conservative step of allowing LECs to have the effective equivalent of Phase II pricing flexibility in all areas that they serve over the next two years. In part, this relief should be granted because, from an economic standpoint price regulation is inappropriate for special access service. This reason would apply even in an area that has less than robust competition. BellSouth's request is also premised, in part, upon the substantial amount of competition that currently exists in BellSouth's

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[96] The term price regulation in this context refers to both inflexible price caps and rate of return regulation. See Furchtgott-Roth, Hausman Declaration at 23.

region. Accordingly, BellSouth should be granted the requested relief immediately. To the extent that other LECs are able to make a showing of competition in their region that the Commission deems adequate to constrain prices, they should, of course, have the same relief.

Again, the approach proposed by BellSouth is very conservative in light of current market conditions. During the two-year transition period, the Commission will have the continuing ability to review the rates, terms and conditions at which LECs offer special access services. That is, the LECs (unlike their non-LEC competitors) will continue to have the requirement to file contract tariff offerings with the Commission, and these contracts will be subject to review by the Commission, and by the LECs' competitors. To the extent that any party believes that the prices, terms or conditions set forth in these contracts are inappropriate, then they will, of course, have the ability to present their complaints to the Commission by way of the numerous vehicles for doing so discussed previously.

For all these reasons, the Commission should act promptly to remove the price constraints that now apply only to LECs' special access services.

VI. THE REMOVAL OF PRICE CONSTRAINTS FOR SPECIAL ACCESS SERVICES ALSO WOULD PROMOTE MORE EFFECTIVE COMPETITION

Relief is also necessary to promote more effective competition in the special access market. In particular, the current pricing flexibility rules hamper BellSouth's efforts to compete in some segments of the market for special access

services by granting a form of relief that is of limited utility. Specifically, geographically limited pricing flexibility does not allow price cap LECs to assemble packages of services that fit the needs of many potential customers.

As discussed previously, there has been a tremendous amount of deployment of facilities by CLECs and others who now compete with the LECs to provide special access services or their equivalent. These competitors are increasingly moving into smaller markets and even into rural areas. This trend makes perfect sense. Special access transport and channel terminations are point-to-point services. It is not necessary for a competitor to duplicate a LECs' network to be a successful supplier of these dedicated circuits. Also, a single customer location can provide a high volume of usage. These factors at least partially explain why BellSouth's competitors currently dominate the provision of high capacity services such as those at the OCn level. These same factors can prevent LECs from successfully competing for these customers.

Assume, for example, that an office park, automobile factory, or other large industrial plant is constructed in a rural area. An alternative provider has the ability to build fiber-based facilities to that location, and the potential to profitably serve large customers provides the motivation to do so. The alternative provider also has the ability to price its services as it deems fit, or as is necessary to obtain the customer's business. In this example, the rural location makes it unlikely that pricing flexibility would be available to a LEC, which presents a substantial

impediment to the LECs' ability to negotiate a competitive arrangement that the customer will find acceptable.

LECs are equally hamstrung in their ability to compete to provide service to purchasers of special access throughout BellSouth's region as a wholesale component of the retail services that they provide. If a competitive provider of access services obtains a carrier or other customer that wishes to purchase service across a multi-state area, BellSouth's competitor is free to negotiate a pricing arrangement that applies uniformly across the entire area. A LEC, however, may have facilities in place throughout the multi-state area, but the structure of pricing flexibility may hamper the ability of the LEC to negotiate a region-wide service arrangement. For example, if a customer wishes to negotiate a regional contract for special access services, BellSouth can only offer services at the mandated price cap rate in any area in which it does not have pricing flexibility. Thus, a regionwide contract is likely to include a checkerboard of differing prices. That is, it may be impossible for BellSouth to offer service at uniform, negotiated rates. Having a limited ability to negotiate rates for all the areas in which a potential customer requires service is an obvious, inherent limitation on the ability of the LEC to compete.

VII. THE FEASIBILITY OF MODIFICATIONS TO THE PRICING FLEXIBILITY TEST

The *NPRM* reaches the tentative conclusion that pricing flexibility rules should continue to "apply where competitive market forces constrain special

access rates."[97] The *NPRM* does not conclude, however, that pricing flexibility should necessarily continue in its present form. Moreover, the *NPRM* specifically states an intention to "examine whether the Commission's pricing flexibility rules have worked as intended and, if not, whether they should be modified or repealed."[98] To this end, the *NPRM* identifies a number of approaches that parties may undertake to answer the question of whether there is competition in the areas in which pricing flexibility has been granted, and, by extension, the question of whether the current test works.

BellSouth has previously discussed the numerous analyses that it has submitted, which utilize different approaches to the assessment of the competitive market, and which all reach the same conclusion. Analyses of pricing trends, revenue trends, and market share all demonstrate the presence of substantial competition. Not only is there substantial competition in all aspects of the special services market, some segments of the market are dominated by BellSouth's competitors (e.g., high capacity IOF). Given this, any party that claims that there is no competition in areas that the pricing flexibility test has identified as competitive is simply wrong. Given the existence of substantial competition in the areas in which pricing flexibility has been granted (and, in fact, throughout BellSouth's region), there is no credible argument that the current pricing flexibility test results in findings of competition when none exists.

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97 *NPRM*, 20 FCC Rcd at 2004, ¶ 24.

98 *Id.* at 2018, ¶ 71.

The problem with the current pricing flexibility test is precisely the opposite: it substantially understates the extent of competition. This understatement occurs for two reasons. First, the test is designed in such a way that it fails to consider competition that utilizes facilities that bypass LEC networks. Second, the test fails to consider the competition from providers that have chosen to utilize UNEs as a competitive vehicle.

When the Commission developed the pricing flexibility test in the *Pricing Flexibility Order,* a collocation-based test was chosen, at least in part, because it could be more readily administered than any of the other alternative approaches. Also, many of the other alternatives were considered too costly or burdensome.[99] For example, the Commission determined specifically that it would be too burdensome to require a LEC to perform (and the Commission to consider) an analysis of market share or demand elasticity as a predicate to regulatory relief.[100] The Commission also stated the following:

> Although the presence of competitive facilities within a wire center may well be the best evidence of irreversible investment, this type of trigger is neither simple to administer nor easily verifiable . . . . A competitor has "installed its own facilities" within a wire center if, for example, it has laid fiber anywhere within the area served by the wire center, but a separate analysis is required to determine what proportion of the incumbent's customers the competitor can serve with those facilities. Our desire to avoid these administratively burdensome proceedings compels us to adopt collocation as a measure of competitive presence.[101]

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99 *Access Charge Reform, et al.*, CC Docket No. 96-262, *et al., Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, 14267-72, ¶¶ 84-91 (1999) ("*Pricing Flexibility Order*").

100 *Id.* at 14272, ¶ 91.

101 *Id.* at 14274, ¶ 94.

While the collocation test may be administratively easy, the fact remains that this test has necessarily become a less reliable indicator of the amount of total competition as competition has increased that utilizes facilities that bypass the LEC networks. In other words, in the past, when competition from bypass facilities was minimal, the pricing flexibility test could fail to consider this competition, but still provide a reasonably accurate picture of the competitive market. However, given the extensive use of bypass facilities by competitors today, any test that does not consider these facilities substantially understates the amount of competition.[102]

The second principal deficiency in the test is its failure to address the fact that UNEs are now routinely used as a means to compete with LECs. In the *Pricing Flexibility Order*, the Commission stated that collocation-based standards provide a better basis for Phase I triggers "than standards based on availability of UNEs and resale, because availability does not indicate whether they actually have been purchased."[103]

The Commission also noted that, since the use of UNEs does not require investment per se, this usage is a less reliable indicator of permanent competition. In this regard, the Commission noted that if a competitor that has made a "small investment" by building facilities leaves the market, the facilities can be sold to

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[102] For example, carriers that elect to utilize "collocation hotels" are completely ignored by the Commission's current pricing flexibility test.

[103] *Pricing Flexibility Order*, 14 FCC Rcd at 14270, ¶ 88.

other competitors.[104] However, this "permanent competition" approach does not make economic sense. In effect, the Commission is stating that there are no sunk costs to investment so the conclusion must follow there are no barriers to entry. When this is the case, prices cannot increase to supra-competitive levels because competitive entry will take place to force prices back down. It is economically unsupportable to claim that in a situation in which barriers to entry have been removed, regulation is needed because "permanent competition" might not exist. Indeed, from an economic standpoint, "no barriers to entry" means "no market power."

Even assuming these conclusions were reasonable in 1999, they simply no longer pertain. As reflected in the RHK analysis, 30% of the sub-market comprised of DS1 level tail circuits (i.e., local channels running between the end user and the LEC end office) is served by competitors of BellSouth that utilize UNEs to provide service. There is no longer any question as to whether the available UNEs are being purchased by competitors.

As reflected in the RHK study described above, it is not uncommon for providers of high capacity circuits to have 80% or more of the market for these services. In a market in which the incumbent has so small a share, there is no rational basis to refuse the incumbent the same ability to set prices at competitive levels that is enjoyed by other competitors in the market. Given the fact that the market for special access services has reached this point, it would seem that the

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104 *Id.*

pricing flexibility test has outlived its usefulness. In other words, because there is so much competition, both UNE-based and facilities-based, the real solution is not to tweak the pricing flexibility test, but rather to move beyond the test, to acknowledge the fully competitive nature of the market and to allow LECs the freedom to price competitively.

As to possible modifications to the test, the problem that competition that bypasses BellSouth's network cannot be detected by a collocation test is likely irremediable. Any test that might detect bypass facilities would be very complex, and too burdensome to undertake each time a request for pricing flexibility is made. The better alternative is to assess the degree of competition in the context of this proceeding by considering data that indicates bypass competition, such as the RHK study submitted by BellSouth, then grant across-the-board relief from pricing constraints. If, however, the Commission decides to keep the pricing flexibility test in place, it should, at a minimum be modified to take into account both facilities-based competition (as evidenced by collocation arrangements) and UNE-based competition.

VIII. OTHER ISSUES

A. Expense Matrix Data

The *NPRM* notes that in an Order entered in 2000, "the Commission eliminated the requirement that LECs report the expense matrix data used in calculating the X-

factor."[105] The *NPRM* also states, however, that price cap LECs are still required to retain this information, and the *NPRM* requests that price cap LECs submit this information for the years 1994 to 2004. BellSouth hereby complies with that request by attaching the expense matrix data hereto as Attachment 8.

At the same time, BellSouth notes that, for all the reasons set forth above, the Commission should not attempt to use this data to develop an x-factor. The proposed calculation of an x-factor would necessarily be a part of a regressive price cap regime that is wholly inappropriate in the current competitive market for special access services. As discussed previously, there is more than adequate competition in the market to constrain prices. There is no need for regulators to control prices in any areas in BellSouth's region, even those in which pricing flexibility has, to date, not been granted. Further, as set forth in the declaration of Drs. Furchtgott-Roth and Hausman, the retention and/or extension of price cap regulation is not an economically rational approach to the special access market. Thus, while BellSouth hereby complies with the Commission's request, it objects to the proposed use of this data.

B. Tariff Terms And Conditions

The *NPRM* requests comment on the question of whether there should be restrictions on the discounts available in the tariffed offerings of price cap LECs. In this section of the *NPRM*, the Commission begins by summarizing both the arguments for and

[105] *NPRM*, 20 FCC Rcd at 2008, ¶ 36, citing *Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase I,* CC Docket No. 99-253, *Report and Order*, 15 FCC Rcd 8690, 8694, ¶ 7 (2000) ("*Phase I Accounting Streamlining Order*").

against discounts related to the term of the purchasers' commitments and the volume of service purchased.[106] The *NPRM* then raises numerous questions about whether such practices as bundling services and offering discounts for volume and term commitments are reasonable.[107] In effect, all these questions relate to one central inquiry: once a LEC has been granted pricing flexibility, should there be restrictions on the discount that the LEC offers as an exercise of this flexibility. BellSouth submits that this question must be answered in the negative.

The *NPRM* states as the basis of this inquiry the conclusion that "market power can also be exercised through exclusionary conduct. Such conduct may be evidenced from the terms and conditions contained in a carrier's tariff offering."[108] The *NPRM* also notes the Commission's historical practice of scrutinizing the offerings of "dominant carriers" to detect such conduct.[109] Thus, the entire issue begins with the implicit assumption that LECs retain a level of dominance in the special access market so great that the Commission should consider imposing restrictions on the LECs that are not imposed on other carriers. However, given the current state of competition in the special access market, there is no justification for placing unnecessary restrictions on LECs that inappropriately constrain their efforts to compete for customers.

BellSouth believes that discounts based on volume and term commitments are standard throughout the telecommunications industry and are utilized by all carriers. The

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106 *Id.* at 2032, ¶¶ 116-18.

107 *Id.* at 2033-34, ¶ 119-23.

108 *Id.* at 2031, ¶ 114.

109 *Id.* ¶ 115.

only difference between the LECs' use of contracts with these features and their non-LEC competitors is that LECs are required to file the contract tariffs with the Commission, which allows competitors to be aware of these offerings. Non-LEC competitors who utilize these exact same service offerings are not required to make the same sort of filing, which allows them to be more circumspect about the discounts they offer.[110] Therefore, it is not surprising that non-LEC competitors generally do not argue that, for example, volume and term discounts should be disallowed for all carriers, but only that LECs should bear this restriction.

Likewise, the arguments that LECs should be restricted in the ways discussed in the *NPRM* all tie in to the notion that, as alleged dominant carriers in a market with purportedly little competition, the LECs' ability to bundle service offerings, to provide progressively better prices with progressively larger volumes of purchases or to provide discounts in exchange for contracts with extended terms can and will be used in some predatory way that will harm competition. If, indeed, these arguments ever had credence (a doubtful proposition), it is obvious that they have none now, given the reality of the highly competitive special access marketplace. As previously stated in some detail, BellSouth enjoys a very small market share in various segments of the special access market, and <u>all</u> aspects of the market are competitive. Given this, there is simply no justification for treating the LECs differently from the other carriers in the market.

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[110] If any party contends that they do not offer volume and term discounts, then they should file their contracts with the Commission to prove this claim.

The rules that hold common carriers to the "just and reasonable standard" and prohibit discrimination apply to all carriers in the market, LECs and non-LECs alike.[111] These rules are adequate to address complaints of predatory or discriminatory behavior by any carrier. There should not be a set of special, more restrictive, rules applied to LECs to limit their ability to develop competitive offerings. There is no justification in the current competitive market for this type of selectively applied restriction.

IX. CONCLUSION

On the basis of the foregoing, it is clear that competition for special access services is substantial and increasing. Because the current level of competition is more than adequate to constrain prices, there is no need for placing the restrictive pricing controls upon LECs contemplated in the *NPRM*. Further, the economic harm of doing so would far outweigh any possible benefit. For all these reasons, the Commission should immediately remove all constraints on the LECs' ability to price special access services.

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[111] *See* 47 U.S.C. §§ 201, 202.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 13th day of June 2005 served the following parties to this action with a copy of the foregoing **COMMENTS OF BELLSOUTH** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed below.

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