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
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INITIAL COMMENTS OF WILTEL COMMUNICATIONS, LLC

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SUMMARY

The Federal Communications Commission ("FCC" or "Commission") must revise its special access rules to address the marketplace reality that competition for special access services is inadequate to constrain the prices of ILECs regulated under the Commission's price cap mechanism ("Price Cap LECs"). The existing regulatory regime counts on competition that has never developed to discipline the behavior of Price Cap LECs. As a result, they are able to impose unreasonable rates, terms and conditions on special access customers. These ILECs maintain an overwhelming competitive advantage in the provision of end-to-end services, an advantage that will be exacerbated upon consummation of the pending mergers between the largest ILECs and the largest CLEC and IXC competitors. Accordingly, the Commission must immediately reinitialize the rate levels for Price Cap ILECs' interstate special access services, modify its pricing flexibility and price cap rules, and prohibit anticompetitive practices by ILECs that restrain competition and keep special access prices artificially high.

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WilTel Communications, LLC ("WilTel") hereby provides its Initial Comments in the proceeding referenced above.1 In these Comments, WilTel supports the many telecommunications service providers and users who have expressed concern that the special access regime allows price cap incumbent local exchange companies ("Price Cap ILECs") to impose unreasonable rates, terms and conditions on special access customers. Accordingly, the Commission must immediately reinitialize the rate levels for Price Cap ILECs' interstate special access services, modify its pricing flexibility and price cap rules, and prohibit anticompetitive practices by ILECs that restrain competition and keep special access prices artificially high.

I. INTRODUCTION

WilTel is a major provider of long-haul voice, video and data transport services to ILECs, CLECs, broadcasters, ISPs, cable TV companies, and small-to-mid-size enterprise customers. In each of these markets WilTel and its competitors are

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1 *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Notice of Proposed Rulemaking, rel. January 31, 2005 ("*NPRM*").

inextricably dependent upon purchases of ILEC special access to link to customer premises and provide the end-to-end solutions that customers demand. To fulfill this demand, WilTel must obtain special access in a market largely dominated by ILECs. To be sure, limited competition exists in certain confined geographic areas, for certain types of special access products. However, even in locations where alternatives do exist, the structure of ILEC discount plans - under which carriers are offered substantial discounts on their total spend only if they meet conditions such as purchasing from the ILEC 90% or more of the amounts of special access they purchased in the past - curtail the ability of WilTel and other carriers to select alternate special access providers.

WilTel submits these comments amid deep concern that inadequate competition is developing in most special access markets and that the current rules, which were put in place in anticipation of robust and geographically ubiquitous facilities-based rivalry, are inadequate to deal with the actual market problems facing special access today. Although this problem is particularly serious with respect to channel terminations, it also impacts other special access services in even the largest geographic markets, where CLEC interoffice fiber and collocation is often present in only a limited percentage of wire centers. Moreover, the Commission is currently reviewing mergers in which the two largest ILECs are acquiring the two largest CLECs and long-haul service providers. The rules restraining ILEC monopoly pricing behavior are woefully inadequate to deal with the potential for cross-subsidy and preferential dealing that these mergers portend. The Commission must now act decisively to establish new rules that govern ILEC behavior in a market characterized by market dominance and limited competition rather than playing a game of "Waiting for Godot" in hopes that meaningful competition will arise despite numerous structural impediments and barriers to entry that the Commission has already recognized.

II. THERE IS INADEQUATE COMPETITION IN MOST SPECIAL ACCESS MARKETS TODAY

A. Less Competition Is Emerging In the Special Access Marketplace Than Was Expected in 1999

Immediately following divestiture, only ILECs provided special access services, and they were subject to rate-of-return price regulation to prevent their use of market power to restrain competition and raise or maintain high prices. In 1991, the Commission implemented price cap regulation, which sought to emulate competitive market pricing and provide an incentive for ILECs to improve productivity by setting a price cap and allowing the ILEC to set prices within the cap and take advantage of cost reductions. The price cap was changed each year to reflect a percentage by which the ILEC's productivity was estimated to exceed the economy's growth rate. In 1997 the Commission announced its intent to look to competition as the primary means to regulate special access, and in 2000 it introduced the CALLS plan that lowered special access prices until 2004 with the hope that by 2005 competition would prove sufficient to constrain prices. In 1999, the Commission established its Pricing Flexibility mechanism, which was meant to allow Price Cap LECs to raise and lower prices to meet the expected competitive onslaught. Sadly, such competition did not develop in the vast majority of markets.

The Commission's market-based approach to regulating special access appeared to many to be proper given their optimistic vision of potential expansion of competitive carriers in the local retail and wholesale sector. Unfortunately, the results have been much less impressive than expected, for a number of reasons.

First, the Commission relied heavily on the resale and UNE provisions of the Telecommunications Act to provide competitors with a "jump start" into the local services market. However, while approach did allow CLECs and IXCs to offer bundled local and long-distance services, it did little to spark competition for special access. Resellers of local exchange service have largely remained resellers of local exchange service.2 On the other hand, to the extent that a CLEC could enter the market by buying UNEs and then use the UNEs to provide special access, they could underprice the ILEC and offer competitive services. However, the elimination of and uncertainty regarding access to UNEs has reduced competition for special access.3 In these areas, the ILEC could exercise pricing power.

Second, the pervasive, easy access to capital and numerous announcements of entry into the facilities-based local market was seen as a signal that the barriers to entry into the local market were falling. However, the barriers to entry in local access generally, and special access in particular, are far more formidable than simply acquiring capital funding to build a metropolitan fiber ring. As WilTel's own experience in this area indicates - obtaining building access, the economies of scale that exist in serving individual locations, and the need to surmount the advantages of network ubiquity enjoyed by the incumbent - mean that entrants face huge barriers to economic

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2 For example, according to SBC, the number of resold access lines dropped by over 800,000 in the past year—Source: SBC 1st Quarter 2005 financial results).

3 *Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, rel. February 4, 2005 ("*TRRO*") ¶ 65 ("the availability of UNEs is ... a check on special access pricing, and ... elimination of UNE availability to customers using tariffed alternatives might preclude competition using those tariffed services going forward.").

success even where they have made initial investments.4 Indeed, SBC itself announced a massive plan to launch itself as a competitive CLEC in 30 "Out-of-Region" markets in 1999.5 However, despite its name brand, prodigious financial capabilities, and century-old background in local exchange, it is not a significant player in any of these 30 markets.

Third, the Commission was operating in an environment where local access providers were still structurally separate from affiliated purchasers of access services. Accordingly, while lack of competition resulted in special access prices that are higher than they would have been in a competitive environment, the result was probably to raise the input prices of all downstream firms (including ILEC affiliates) in a manner that was not so lopsided as to determine the competitive fate of those firms. Today, however, Section 272 separation requirements are being allowed to sunset,6 and the two largest ILECs are in the process of purchasing their largest access customers, who are also their largest local exchange rivals. Thus, absent serious reform and price reduction, RBOCs will have both the means and the incentive to disadvantage competitors in the market for retail telecommunications services through their special access pricing and marketing practices. Importantly, as special access prices far exceed costs currently, just allowing the existing regime to continue constitutes an economically unjustifiable subsidy from rival firms to the vertically integrated incumbents.

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4 *See, e.g., TRRO* ¶¶ 72, 150.

5 SBC Press Release, "SBC-Ameritech Merger Will 'Jumpstart Competition': Chairmen Cite Growth, Consumer Benefits of Merger Before FCC", San Antonio, Texas, October 22, 1998; SBC Press Release, "SBC Forms Alliance With Williams Communications To Transport Long-Distance Data and Voice Traffic", New York, New York, February 8, 1999.

6 *See, e.g., Public Notice*, "Section 272 Sunsets For Bellsouth Communications Inc. in The States of Georgia and Louisiana by Operation Of Law on May 15, 2005 pursuant to Section 272(F)(1)", WC Docket No. 02-112, rel. May 16, 2005.

Finally, in underestimating the decisive advantages held by the ILECs, the Commission prematurely granted pricing flexibility for special access, under which the ILECs created discount plans that are simply "tying contracts" that force customers to purchase access from the ILEC even in specific locations where competition does exist, in order to obtain discounts necessary to be successful in the majority of locations where there is little or no competition.

As a result of this mismatch between regulatory policy and market reality, vast stretches of the U.S. special access markets lack both competition and effective price regulation.7 While the ILEC remains the only option from which WilTel and others can obtain special access service in many locations, prices remain far above cost, profits are supranormal, and service quality - especially service delivery - are very poor compared to that of the rest of the industry. Absent effective regulation, the ILEC can unilaterally set prices for special access at unreasonably high rates. By setting special access prices at above-cost rates, for example, the ILECs can impose price squeezes on its competitors such as WilTel with respect to the market for end-to-end services by providing the end-to-end service using the same facilities, available to the ILECs themselves at forward-looking economic cost.

Indeed, the very fact (described below) that ILECs are able to convince customers to accept anticompetitive discounts and impose unreasonable charges evidences the ILECs' monopoly position and the need for more effective regulation of their rates, terms and conditions. In a competitive market, special access customers

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7 *See, e.g., Applications of SBC Communications, Inc. and AT&T Corporation For Consent To Transfer Control of Section 214 and 308 Licenses and Authorizations and Cable Landing License*, WC Docket 05-65 ("*SBC/AT&T Merger Petition*"), *CompTel/ALTS Reply Comments*, Reply Declaration of Lee L. Selwyn at ¶ 25 ("*Selwyn Reply Declaration*") ("Fewer than 20,000 competing facilities are available nationwide").

would refuse to accept unreasonable conditions on discount prices and would not sign up for a service that would require insurmountable hurdles for changing providers after the term has expired.

Where competition has developed, moreover, it has done so in small pockets of the country, and for some special access services more than others. As the Commission recognized in the *TRRO*, competitors entered the market only where sufficient demand existed to justify the investment and where they could build or obtain the necessary facilities. WilTel's own data shows that there are approximately 36,000 ILEC central offices each of which serve a large number of buildings and an even greater number of businesses, while competitors' networks that WilTel has the ability to utilize reach only 27,000 such buildings.[8] To the extent competition has developed, moreover, there is much less competitive activity, and many fewer competitive alternatives, with respect to channel terminations (local facilities extending to serve end-user locations) than for interoffice facilities.

B. Special Access Pricing Is Unlawfully High

The mismatch of regulatory policy and market reality rests squarely on the shoulders of special access customers—and the weight is crushing. Evidence on the record shows that price cap LEC special access rates allow supra-competitive returns, indicating that they are exploiting the benefits of their monopoly market power. In the *NPRM*, the Commission acknowledges that "BOC interstate special access accounting rates of return were approximately 38, 40, and 44 percent in 2001, 2002, and 2003, respectively."[9] The Commission further acknowledges that this data "suggest that the

8 Attachment, Declaration of Mark Chaney ("*Chaney Declaration*") ¶ 4.
9 *NPRM* ¶ 27.

BOCs have realized special access scale economies throughout the entire period of price cap regulation…".10

The Commission's view is pure understatement. From 1999 through 2005, interexchange prices have dropped orders of magnitude. Technological advances allow ever cheaper interconnections. The ILEC special access networks are already built, in place and paid for, and only need to be maintained. Yet the current special access pricing regime allows pricing to remain constant, and even go up. Moreover, WilTel's experience is that, as even the threat of potential competition has diminished, the operational practices of ILECs have become more restrictive, less customer-friendly, and more expensive to deal with. To look at special access pricing, one would think that this service is uniquely immune to Moore's Law and technological advance.11

If the special access market were actually competitive, CLECs competing with the ILECs would force the incumbents to reduce their prices and the ILECs therefore would not earn such high rates of return. Price Cap LEC pricing activity where the Commission has permitted them to operate outside of price caps show not only that there is insufficient competition to force special access price reductions, but that there is even insufficient competition to constrain price increases.12 The price cap system therefore is not currently simulating a competitive market.

The Commission's pricing flexibility policy has only aggravated this situation by further reducing competition and allowing higher rates. When the Commission instituted its pricing flexibility mechanism, it did so on an MSA-by-MSA

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10 *NPRM* ¶ 29)
11 *See* Newton's Telecom Dictionary, 16th Expanded and Updated Edition, at 573.
12 *Chaney Declaration* ¶ 4.

basis.13 As a result, a price cap LEC could meet pricing flexibility triggers by pointing to collocations in a small number of wire centers (or even a single wire center) within the MSA that would give them pricing flexibility across the entire MSA. As many parties have recognized, ILECs have obtained pricing flexibility based on a single wire center even where other wire centers within an MSA do not have any competition.14 As a result, ILECs have been able to raise prices in MSAs in which they were granted pricing flexibility. In many cases, moreover, they have not been forced to reduce prices even in wire centers where they met the threshold, because their volume discount plans have prevented CLECs that may be collocated at such wire centers from actually obtaining business and thereby putting pressure on ILEC rates.

While inadequate competition has developed to date in the existing special access marketplace, the proposed SBC/AT&T and Verizon/MCI mergers, in which the two largest CLECs will merge with the two largest ILECs, would make matters much worse and make the need for special access reform far more urgent. As many parties have pointed out, AT&T and MCI in most cases are the primary, if not the only, ILEC competitors for special access service.15 They have unique market positions as competitors because of the breadth of their network reach, and the associated administrative efficiencies, compared with dealing with smaller and more localized entrants. These carriers are by far the largest recipients of WilTel CLEC special access business and, in WilTel's experience, have been the only carriers to pose any challenge to

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13 *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-63, 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14260 ¶72 (1999) ("*Pricing Flexibility Order*").
14 See *NPRM* ¶ 88 (*citing* AT&T Reply, Reply Declaration of Lee L. Selwyn at paras. 16-21).
15 *See, e.g.*, *SBC/AT&T Merger Petition*, Opposition of Broadwing Communications, LLC, and Savvis Communications Corporation to the Merger Application Filed By SBC Communications, Inc., and AT&T Corp. ("*Broadwing/SAVVIS Opposition to Merger*") at 25.

WilTel's use of ILEC special access services. If the mergers are granted and the parties are allowed to retain their local and access facilities, there will be no serious opportunity for special access competition. In all likelihood, SBC/AT&T and Verizon/MCI would use their local and access facilities for their own use and not offer competitively priced special access. AT&T and MCI would disappear as overbuilders in the respective SBC and Verizon regions. Any competition that did exist (with the commensurate brake on ILEC pricing) – and any chance for the development of more robust special access competition in the future – would be eliminated.16

C. RBOC Discount Rate Structure and Other Practices Restrict Competition That Could Potentially Reduce Special Access Pricing, Especially Where the Commission Has Granted Pricing Flexibility

A number of parties have shown that price cap ILEC pricing behavior severely limits the ability of CLECs to compete for special access services.17 As Lee Selwyn has pointed out, Price Cap LECs are "the only source of special access services to every customer location throughout the LEC's footprint."18 This unique capability allows LECs to employ discount pricing schemes based on a wholesale customer's aggregate purchases of the LEC's special access services throughout its territory. For example, under one of SBC's discount programs, "the customer (an IXC or a CLEC) is required to commit 90% of its total special access demand to SBC, or purchase 90% of its base period demand from SBC, in order to qualify for the discount and/or avoid being

16 *See, e.g.*, *SBC/AT&T Merger Petition*, CompTel/ALTS Petition to Deny ("CompTel/ALTS Petition to Deny Merger") at 16; *Broadwing/SAVVIS Opposition to Merger* at 27-28.
17 *See, e.g.*, *Broadwing/SAVVIS Opposition to Merger* at 25 (*citing AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Reply Comments of WorldCom, RM No. 10593, Declaration of Michael D. Pelcovits at 12-13 (filed Jan. 23, 2003)) ("the only way to receive a discount on the non-competitive route is to buy from the BOC along the competitive route").
18 *Selwyn Reply Declaration* ¶ 39 (*citing* Statement of Joseph Farrell, Attachment A to Comments of Global Crossing North America, April 25, 2005 ("Farrell Statement"), at paras. 30-36)

forced to incur a penalty.19 According to Selwyn, "in order to meet the minimum volume threshold, special access customers may be compelled to forgo purchasing special access services from a CLEC or CAP competitor - or perhaps even forgo self-supply - even if its price or cost is below that of SBC, if by making such a purchase the customer would then fall below the 90% SBC contract demand threshold."20 Verizon's Commitment Discount Plan and BellSouth's PSIP plan work in a similar way, requiring that customers meet 90-95% of their commitment throughout the ILEC territory in order to receive substantial discounts.21 In this way, ILECs leverage their monopoly to foreclose competition elsewhere even where it may otherwise be economically viable. As Mr. Selwyn points out, "[t]his type of volume-based pricing device gives [ILECs] the ability to extend their de facto monopoly over most special access services over to the small fraction of the total special access universe where some competitive entry has developed."22

These discount programs raise prices overall. Through the discount program, the ILEC sets a price that, while lower than the baseline price cap rate, excludes competitive entry that could result in even lower prices.23 For example, a rate under one of the discount plans may be $100 but only if WilTel meets its revenue commitments across the ILEC's territory. CLECs cannot compete even in "competitive" markets, even if they offer a rate of $95 in such markets, because WilTel must send all of its traffic to the ILEC in order to qualify for the $100 rate. If the ILEC reduced its rate to $100

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19 *Id.*
20 *Id.*
21 *See, e.g.*, BellSouth Telecommunications, Inc., Tariff F.C.C. No. 1, 1st Revised Page 2-49.0.18.14, Section 2.4.8(G)(1) (Effective June 24, 2004).
22 *Selwyn Reply Discount* at ¶ 40.
23 *Chaney Declaration* ¶ 6.

without the requirements, however, then CLECs could compete in "competitive" markets without concern that IXC special access traffic would be locked up. As a result, prices in competitive markets would be at the new SBC rate or below, and there could be more competition in "non-competitive" markets.

Even where CLECs do pose a challenge to Price Cap ILEC special access services, the ILECs make it extremely difficult to actually groom circuits to CLECs, by delaying the groom and by charging unreasonable, non-cost based nonrecurring charges to accomplish the groom. As an initial matter, ILECs will groom only a small number of circuits per day, with the result that IXCs must wait weeks to switch a commercially reasonable number of special access circuits to CLECs (including the IXC itself). For an IXC to move 100 circuits off SBC's and onto a competing network, for example, SBC would allow a special access purchaser to groom only 8 circuits per day, resulting in at least a 13 day grooming process. Moreover, to accomplish this groom, WilTel would in many cases have to pay outrageous nonrecurring charges to the extent that the applicable circuit is used for switched traffic. In PacBell territory, for example, the one time charge for moving a circuit from PacBell to another carrier can be almost $5,000 per circuit. For WilTel to move 100 circuits to a competing provider of transport services (such as WilTel itself or a third party), WilTel would have to pay a NRC of up to $50,000. These charges undermine the economics of switching special access providers. 24/

24 *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, § 6.8.2(H), page 6-216, and § 7.5.9 (D), pages 7-189 and 7-190. A circuit that is ratcheted between special and switched access would be subject to these charges in the event of a move to a competitive carrier.

III. THE COMMISSION MUST ALIGN SPECIAL ACCESS REGULATION WITH MARKETPLACE REALITY

As discussed above, the inadequacy of the special access rules is particularly significant given the competitive importance of special access in the retail telecommunications services market. As ILECs increasingly compete in the business and enterprise market, they are able to leverage excessive special access prices to capture market share from competitors who are dependent on the ILEC's access. Thus, even where a competitor operates higher quality, more efficient interexchange network, it is placed at a competitive disadvantage by profit margins in ILEC access rates. The result is to increase overall prices to end users, and distort competition in the interexchange marketplace.

To remedy this situation, the Commission must:

- ✓ Reinitialize recurring and non-recurring rates based on forward-looking economic costs;
- ✓ Prohibit anticompetitive measures used by Price Cap ILECs to hinder use of competitive special access services –discounting based on aggregated volumes across regions and discounting based on percentage of prior year's spend;
- ✓ Modify its pricing flexibility rules to more accurately provide Price Cap ILECs with the ability to meet real competition; and
- ✓ Restructure price caps, bands, and baskets to reflect today's market structure.

A. Reinitialize Rates Under Price Caps

The Commission absolutely must reinitialize the price cap ILECs' recurring and non-recurring rates for special access services. Information on the record and in the NPRM shows that Price Cap ILECs are earning supra-competitive rates of return in violation of Section 201 of the Act. These supra-competitive returns are possible only because ILECs face only limited competitive pressure to force them to reduce their prices, particularly in geographic areas outside central cities, and particularly for channel terminations. Upon the termination of the CALLS regime, the Commission should recognize that continued regulation of Price Cap ILEC prices through the price cap mechanism remains necessary and reinitialize rates at a realistic level that allows customers to buy special access at rates that do not permit the LEC to engage in a price squeeze. This rate must be forward-looking economic cost-based and nondiscriminatory. To be reasonable under the circumstances, the rate must be set at a modified TELRIC level.

In the *TELRIC NPRM*, the Commission proposed "to simplify TELRIC pricing, while simultaneously improving the accuracy of its pricing signals, by resolving one of the key internal tensions that marks its current application: the assumption that for some purposes rates should reflect a market with widespread facilities-based competition but, for other purposes, rates should reflect a market with a single dominant carrier."25 The Commission "tentatively conclude[ed] that [its] TELRIC rules should more closely account for the real-world attributes of the routing and topography of an incumbent's network in the development of forward-looking costs."26 The Commission sought comments on several alternatives for taking into account the ILECs' forward-looking costs. To date, the Commission has not acted on this NPRM.

ILEC special access pricing should be reinitialized at a level that approximates the ILECs' forward looking costs as determined by the Commission in the *TELRIC NPRM*. While it is clear that a historical cost method of determining costs, even

25 *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Notice of Proposed Rulemaking, rel. September 15, 2004 ("*TELRIC NPRM*"), at ¶ 4.
26 *TELRIC NPRM* at ¶ 52.

under a price cap regime, has not constrained costs, a mechanism that takes into consideration the actual forward looking costs of the ILECs' network is an appropriate point at which to restart the price cap mechanism. This rate is non-confiscatory, takes into account the existence of the already-paid for ILEC network and massive productivity gains over the past 6 years and will allow companies buying special access to compete on an end-to-end basis with the ILEC.

The Commission cannot allow ILECs to use their market power to raise the price of special access and squeeze out competition. In the *TRRO* the Commission recognized that, absent UNEs, ILECs would "have the ability to set the price of their direct competitors' critical wholesale inputs (e.g., tariffed end-user channel termination and dedicated transport offerings)."27 The Commission further stated that an incumbent "would have substantial incentive to raise prices to levels close to or equal to the associated retail rate, creating a 'price squeeze' and foreclosing competition based on the use of the tariffed wholesale input."28 Although the Commission was discussing the ability of CLECs to compete in the provision of local exchange services with the ILEC, the same analysis applies to any company seeking to compete on an end-to-end basis with the ILEC.29/ Any price over cost will provide the ILECs with exactly that price squeeze capability. Accordingly, the Commission should reinitialize the baseline special access price cap for Price Cap ILECs at the modified TELRIC level described above. This reduced baseline rate will help prevent the anticompetitive effects of volume discounts described above, as there will be less need for ILECs to offer such discounts.

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27 *TRRO* at ¶ 59 (*footnotes omitted*).
28 *Id.*
29 Moreover, although the Commission expressed concern about ILEC pricing increases in the context of pricing flexibility, the same analysis would apply if the price cap rate is above cost.

B. Prohibit Anti-Competitive Discount Plans and Similar Devices Used by ILECs to Leverage Their Special Access Market Power

The Commission also must end the anti-competitive measures employed by Price Cap ILECs to constrain competition. ILEC mechanisms that force special access customers to commit all or virtually all of their traffic in order to obtain the ILECs' best pricing unfairly prevent CLECs from capturing special access business and artificially raise special access rates. As a result of these tying arrangements, CLECs are unable to attract customers (and special access customers lose the benefit of choice), not because their products or customer service are inferior or because their prices are higher but, rather, because ILECs are leveraging their monopoly control over some local markets to inhibit customer service in others. The Commission should end this market distortion by finding that such mechanisms are unjust and unreasonable and establishing specific rules prohibiting them.

These mechanisms are unjust and unreasonable because they are not based on costs or efficiencies and have an anticompetitive effect. The Commission has recognized that true volume discount mechanisms can be just and reasonable if "they are justified by underlying costs, and are not otherwise unlawful..."30 For example, a legitimate volume discount might reflect an ILEC's ability to assume a certain amount of traffic at a particular location that could provide the ILEC with some efficiencies and savings in provisioning and maintaining services at that location. On the other hand, the tying arrangements at issue here have nothing to do with cost savings or efficiencies

30 *Access Charge Reform*, CC Docket 96-262, Third Report and Order, rel. Dec. 24, 1996 ("*Access Charge Reform Order*") at ¶ 187 ("Term discounts recognize cost savings that result from the certainty of longer-term arrangements, and volume discounts reflect the lower per-unit cost of providing higher traffic volumes on high capacity facilities.") (*citing Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion and Order, CC Docket No. 91-141, 9 FCC Rcd 5154, 5202 (1994)).

related to provisioning a service at a particular location. For example, an IXC could meet the applicable thresholds without providing sufficient traffic at any one location to fully utilize an ILEC trunk that would have to be established to accommodate the traffic. More significantly, the discounts allow the ILEC to use market power in one geographic location and/or product market to eliminate competition in other markets.

The Commission should also prohibit other anti-competitive activity. First, the Commission must require that any ILEC NRCs for moving an existing customer circuit to a competitor's network be no more than TELRIC rates. Even if price caps were reset to TELRIC, ILECs should not be permitted to load charges on NRCs that effectively block special access customers from transferring service to a competitor. Second, the Commission should require that ILECs accomplish such moves within reasonable time frames.

C. Modify Pricing Flexibility Rules to Reflect Actual Conditions in Specific Geographic and Product Markets

The Commission must substantially alter its rules applicable to pricing flexibility for Price Cap LECs. Those rules were based on optimistic visions of a future in which facilities-based local competition would grow much more than it has. The reality is that entry barriers in the special access market are much higher than anticipated. The deployment of fiber transport facilities and colocation in certain markets has not meant that competition exists in all end offices in those markets. In particular, competition to reach customer premises is very limited, yet it is crucial to retail service competition in the business market.

WilTel's experience is that in the vast majority of pricing flexibility cases, ILEC prices have increased rather than decreased. Indeed, in many cases, when pricing flexibility has been granted, the result is increased prices, and some of the increases have been substantial with little or no offsetting reductions.31

WilTel does not propose eliminating the Pricing Flexibility tool.32/ Where CLECs provide serious competition to the Price Cap LEC, the ILEC should have the opportunity to compete on a level playing field. However, the Commission's standards for determining whether sufficient competition exists to allow pricing flexibility are flawed. These standards must be based on the reality of existing, sustainable competition and not completely on the Commission's predictions about whether competition can or will occur. In the *TRRO*, the Commission explained that it has sought to drive special access rates towards costs primarily by "granting carriers progressively greater freedom to set their own rates commensurate with the level of competition that has developed."33 By contrast, the Commission continued, its impairment test for UNEs requires an analysis of "whether market entry is uneconomic absent UNEs."34 In sum, while the Commission must look at the possibility of competition in determining impairment, it must look at actual competition in determining whether to grant pricing flexibility. Moreover, pricing flexibility should not relieve ILECs (or CLECs, for that matter) of their existing responsibility to provide nondiscriminatory rates, terms and conditions.

More specifically, the Commission should grant flexibility on a wire center by wire center basis, and only where real, sustainable competition exists. The

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31 *Chaney Declaration* ¶ 5.
32 Nevertheless, the Commission should retain the price cap in all events, even in markets with Tier II pricing flexibility. There is no reason why the ILEC would have to raise prices above the price cap in a competitive market. Price caps already give ILECs broad latitude to reduce their rates.
33 *TRRO* ¶ 61.
34 *TRRO* ¶ 61.

Commission has already recognized that competition for local access takes place on a wire center by wire center basis. In the *TRRO*, the Commission undertook an economic analysis for dedicated transport and loops and determined that it should measure impairment on a route-by-route basis.35 The analysis with respect to special access is the same.36

In its wire center specific competitive analysis, the Commission must first determine not only that collocators exist in the wire center but also that they are providing and are likely to continue providing a competitive loop or transport access service (as applicable). Under the Pricing Flexibility Order, the Commission uses the existence of a fiber-based collocator as evidencing real competition. However, since 1999, it has become clear that (1) a fiber-based collocator does not necessarily provide competitive special access services and (2) to predict competition in the absence of specific information about actual deployment and services, a wire center must contain 4 fiber-based collocators and a threshold number of access lines. Because special access is the last resort for carriers without access to UNEs, the Commission must carefully determine whether competition actually exists on a route before granting pricing flexibility.

The existence of one fiber based collocator does not evidence competition. Such a collocator may be collocated solely for the purpose of serving its own needs. For a high-volume user of ILEC services, collocation may be economical solely for the purpose of originating and terminating its own traffic. For example, WilTel may be

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35 *See, e.g.*, *TRRO* ¶¶ 71-77, 79-80.

36 In the *TRRO*, the Commission departed from a strict route-by-route analysis to "give effect to the reasonable inferences that can be drawn between similar markets" as required by the *USTA II* decision, and therefore looked also at similar routes and the possibility (but not actuality) of competition. *TRRO* ¶ 79. As described above, such reasonable inferences are not appropriate for special access.

collocated at a number of wire centers but for business or other economic reasons does not offer competitive transport at all such wire centers. And it would be uneconomical to provide competitive channel terminations. Moreover, collocation at a wire center does not mean that a carrier provides the same transport service as the ILEC. Many long distance companies use a ring configuration that may pass a wire center but not a tandem office. Even if the long distance company were offering a competing transport service, the customer would have to pull facilities from the tandem office and make its way to the long distance company's POP in order to switch providers.

Because the standard for granting pricing flexibility is based on the existence of actual competition, moreover, it follows that the standard is necessarily higher than the standard for impairment, which is based on potential competition. The Commission determined in the *TRRO* that "[c]ompeting carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines."37 For DS3 transport, the threshold is three fiber-based collocators and 24,000 business lines. The Commission also held that CLECs were impaired for DS1 loops except within the service area of a wire center with four fiber-based collocators and 60,000 business lines. For DS3 loops, the threshold is four fiber-based collocators and 38,000 busienss lines.38 That decision implied that CLECs should be able to compete on a route where the collocation and business/access line thresholds were met. The Commission cannot assume the same for special access service.

37 *TRRO* ¶ 5.
38 *Id.*

To provide for the certainty of competition required by the Commission's special access approach, the Commission must look not only at the number of collocators at a wire center but also at the presence of actual competition for a particular market element. First, the Commission must require more than one collocator at a wire center. These collocators must be CLECs who have obtained Section 251(c)(6) collocation from the ILEC. Second, the ILEC must show that these collocators have deployed competitive transport or loop facilities (as applicable) at OC-N level or above and are offering services on a competitive basis. The ILEC could provide this information to the Commission using data from CLEC tariff filings or advertisements, or the Commission could otherwise require the availability of such information.

Finally, and importantly, the Commission should reassess the triggers for pricing flexibility based on evaluation of actual competition, at the wire center level with regard to entrance facilities, interoffice transport, and channel terminations. This analysis must proceed based on actual data, and not optimistic hopes regarding potential future competition.

At the end of the day, properly designed pricing flexibility rules may grant ILECs more flexibility in certain wire centers for certain special access products. Sound rules also will reduce flexibility in markets where the current rules are overbroad. The Commission has recognized the need for such granular analysis in the context of the *TRRO*. It should do the same with respect to special access.

D. Tighten Nondiscrimination Requirements and Eliminate Discriminatory Discount Rate Structures

Even where pricing flexibility is warranted, the Commission must make clear that all LECs are subject to the nondiscrimination requirements of Section 202 (or

251, if that is the regime in place). The Commission must recognize the reality that, even if one or two competitors are offering a competing access service, an ILEC with pricing flexibility still has the ability to enter into discriminatory agreements. It is one thing to allow "Tariff 12" type of arrangements in a long distance market that is competitive in practice but still regulated as if it were a monopoly, but quite another to allow such arrangements (including the use of contract language to make it impossible for third parties to meet the terms) in an environment in which the incumbent continues to have serious pricing power and an incentive to discriminate. If the Commission grants pricing flexibility, it must also ensure that contracts arising under such relief do not unfairly discriminate.

IV. CONCLUSION

Competition has failed to constrain ILEC special access pricing and behavior, allowing Price Cap LECs to maintain unlawfully high prices. As a result, ILECs have an unfair advantage in the provision of end-to-end telecommunications services, which is likely to become more severe and damaging if the SBC/AT&T and Verizon/MCI mergers are consummated. Accordingly, as more fully set forth in these Comments, WilTel urges the Commission to reinitialize ILEC price cap rates, prohibit ILECs from engaging in behavior meant to restrain competition and reexamine the Commission's pricing flexibility mechanism.

Respectfully submitted,

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