Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

REPLY COMMENTS
OF
SPRINT CORPORATION

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REPLY COMMENTS OF SPRINT CORPORATION

Sprint Corporation, on behalf of its local, long distance, and wireless operations, hereby respectfully submits its reply to comments filed on June 13, 2005, in response to the Notice of Proposed Rulemaking (NPRM) (FCC 05-18) in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY.

Comments filed in this proceeding present two diametrically opposed views of the special access market: either this market is vigorously competitive, with incumbent local exchange carriers' market share reduced to minority percentages, or the market remains dominated by ILECs whose substantial market power enables them to thwart competitive entry and growth. Either special access rates have declined since pricing flexibility was introduced, or they have risen. Either special access customers eagerly enter into volume and term discount plans in order to take advantage of discounted rates, or they reluctantly accept such agreements only because the month-to-month rates are prohibitively expensive and there are no reasonable competitive alternatives to the ILEC. Either rate of return results are relevant to an evaluation of the appropriate regulatory regime, or they are not. On the basis of the facts presented, the Commission should either commit to the deregulation of interstate special access services within a prescribed timeframe, or it should sharply curtail pricing flexibility and subject special access rates to enhanced price cap regulation at re-initialized levels.

Of course, the "true facts" fall somewhere between these two extremes. ILECs doubtless are experiencing competitive losses, particularly in the provision of very high capacity (OCn) special access facilities, and it is clear that there are serious problems with ARMIS which render use of ILECs' regulatory rates of return highly problematic for special access ratemaking purposes. At the same time, parties in a position to comment authoritatively about their use of ILEC special access facilities – IXCs, wireless service providers, large end users – assert that they continue to obtain the substantial majority of their DS1 and DS3 special access facilities (in particular, the channel terminations between the ILEC end office and the customers' premises, and the facilities that connect ILEC central offices and individual CMRS cell sites) from ILECs, and that they are unable to maximize their use of competitive alternatives because of onerous ILEC tariff restrictions and cumbersome facility migration procedures. Moreover, the ILECs' rates (as opposed to their more malleable "unit revenue" figures) have not fallen dramatically since introduction of pricing flexibility (as might be expected in a vigorously competitive market), and for the most part remain significantly higher than price capped rates. Given the still-developing competitive conditions in the special access market, the public interest is best served by a cautious approach which gives ILECs some additional pricing flexibility while protecting customers and competitors against unreasonable prices and practices. The balanced approach set forth in Sprint's initial comments represents a reasonable course for the Commission to follow:

- An end to the current collocation-trigger-based system for determining when pricing flexibility is granted.
- Grant of special access pricing flexibility to an ILEC in any market where it can negotiate a special access contract. The ILEC could offer volume and term agreements or contract tariffs, filed on short notice, and without mandatory compliance with Part 69 special access rate structure rules. However, the ILEC may not offer such contract tariffs to an affiliate unless and until an unaffiliated customer first purchases service pursuant to that contract.
- All generally available special access service offerings are brought back under a system of price caps, initially at their existing rate levels, and subject on a going-forward basis to a 5.3% adjustment factor (as well as an inflation factor and exogenous cost adjustments).
- Establishment of a new category for special access facilities with capacities greater than a DS3, as well as two new subcategories in the DS1 and DS3 basket for channel terminations: (1) between the LEC end office and the customer premises, and (2) between the carrier POP and the LEC serving wire center.

II. THE SPECIAL ACCESS MARKET IS NOT YET FULLY COMPETITIVE.

In support of their claim that the special access market is robustly competitive, three of the RBOCs assert that they have experienced a sharp decline in market share[1] as well as declining prices and/or unit revenues.[2] While ILECs -- including the Sprint ILECs -- certainly have experienced some competitive losses in the special access marketplace, the RBOCs' analyses seriously overstate such losses. The RBOCs remain dominant in the provision of many special access services, charging price flex rates that are substantially higher than price capped rates. While their "unit revenues" may have decreased over the past 5 years, such a decrease is due more to a change in the mix of

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[1] *See,* SBC, p. 11; Verizon, p. 23; BellSouth, p. 23; *see also*, Iowa Telecommunications/ Valor Telecommunications, p. 16.
[2] *See, e.g.,* BellSouth, p. 20; Verizon, p. 5; SBC, p. 21.

services provided and service options chosen, than to competition-induced across-the-board price cuts. While competition in the special access market does exist, it is still developing, and any changes to the existing regulatory regime should appropriately reflect this mixed competitive situation.

1. The RBOCs' Market Share Analyses Overstate Their Competitive Losses.

BellSouth, SBC and Verizon assert that there are many competitive alternatives available, and that their share of the special access market has declined to relatively low levels, particularly in the provision of OCn circuits and interoffice transport facilities.[3] While the RBOCs doubtless have experienced competitive losses at the hands of alternative providers of special access services, their analyses overstate such losses and downplay the fact that the RBOCs remain dominant in many segments of this market. For example, the RBOCs continue to cite CLEC facility deployment as evidence of widespread competitive activity, without acknowledging that the CLECs' deployment is often limited to specific buildings, floors, or even suites. Thus, RBOC market share estimates based on theoretical capacity (number of buildings passed by CLEC facilities, miles of CLEC fiber installed, etc.) necessarily overstate CLEC market presence and market share.

Even the unit-based market share estimates made by the RBOCs do not always jibe with company-specific experience. Several very large special access users asserted in their comments that they continue to rely upon the ILECs to meet a substantial

[3] *See, e.g.,* BellSouth, p. 23 and Attachment 6; Verizon, p. 23 and SBC, p. 16 (both discussing generally the increase in the number and scope of competitive access suppliers).

majority of various of their special access needs.[4] While individual company use of RBOC special access facilities may not necessarily reflect the market as a whole, the difference between Sprint's estimates of RBOC market share (based on Sprint-only usage) and the RBOCs' own estimates (which presumably reflects usage of a much broader universe of customers) is sufficiently large as to cast doubt over any claim that the market as a whole is robustly competitive.

The detailed market share data provided by BellSouth is instructive. BellSouth acknowledges (p. 27) that its share of the DS1 tail circuit market segment (stand alone and UNE combined) was 89% – a figure roughly equivalent to Sprint's own use of BellSouth DS1 tail circuits (92%). However, BellSouth calculates its share of DS3 and OCn tail circuits at much lower levels -- 45% and 21%, respectively (p. 28). These estimates are considerably lower than Sprint's estimates of BellSouth's share of Sprint's business (Sprint currently obtains 81% of its DS3, 65% of its OC3, and 56% of its OC12 tail circuits from BellSouth). It is possible that much of the difference may be due to special access usage of the two largest IXCs, AT&T and MCI. If this is the case, the Commission must carefully consider the impact of their proposed mergers with the two largest ILECs in the country, particularly in SBC's and Verizon's own local exchange territories.

[4] *See, e.g*,, Sprint, p. 7 (relies upon RBOCs for almost 95% of its DS1 circuits and 83% of its DS3 circuits); Broadwing/Savvis, p. 7 (Savvis uses an ILEC-provided component for "most of" its end-to-end circuits) and 9 (Broadwing "currently obtains most of its special access circuits from the ILECs"); Nextel, p. 5 ("remains heavily dependent on special access services offered by the BOCs"); Paetec, p. 6 ("is dependent on ILECs for 95 percent of its special access service lines"); T-Mobile, p. 8 (obtains approximately 96% of its DS1 circuits and 94% of its channel mileage services from the ILECs in their service areas).

2. The RBOCs' Price and Unit Revenue Analyses Do Not Prove That The Special Access Market Is Competitive.

Verizon (p. 5) and SBC (p. 21) claim that their tariffed special access rates have declined, and BellSouth states that its rates have remained flat or increased "slightly,"[5] since the introduction of pricing flexibility. These RBOCs also state that their revenue per unit and the "average true price to the customer" (SBC, p. 21) have decreased considerably since the introduction of pricing flexibility. They claim that this pricing information is evidence of the competitiveness of the special access market.

Sprint disagrees with the RBOCs' conclusion here, for several reasons. First, as Sprint and other commenting parties showed, some of the RBOCs' tariffed special access rates have in fact increased (in some cases, significantly) since introduction of pricing flexibility, [6] including rates associated with what are presumably the RBOCs' most competitive offerings,[7] while other rates have remained flat. Such pricing trends can hardly be considered evidence of a competitive market. If the RBOCs truly were beset by vigorous competitive pressures, with multiple alternative vendors and significant available capacity readily available in the geographic locations required by customers, one would expect RBOC rates to have fallen, rather than to have increased or remained flat.

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[5] BellSouth, p. 16 and Attachment 1 (comparing DS1 and DS3 tariffed rates in MSAs in which it has been granted pricing flexibility). With a single exception (the DS1 per mile interoffice channel rate in Zone 3), it does not appear that any of the rates in Attachment 1 decreased from 2001-present.

[6] *See, e.g.,* Sprint, p. 5 and Attachment 1; AT&T, p. 1; ATX *et al.,* p. 10; CompTel *et al.,* p. 6; Time Warner Telecom, p. 15; XO, p. 5; Ad Hoc, p. 16.

[7] See, for example, the rates charged by Qwest for DS1 and DS3 facilities under its 61-96 month term plan.

Perhaps more importantly, price flex rates (assessed in presumptively competitive markets) compare unfavorably to price cap rates (assessed in markets not yet deemed to be sufficiently competitive to warrant regulatory relief). As shown by numerous commenting parties, price flex rates are almost always higher than price cap rates, and while price cap rates have decreased since pricing flexibility was introduced, price flex rates have remained flat or increased in the majority of cases.[8] As there is no reason to believe that price cap regulation has resulted in unreasonably low rates (indeed, many would argue the very opposite), the growing gap between price capped and price flex rates is troubling evidence that pricing flexibility may have been granted prematurely or in error.

Nor can the apparent decline in special access unit revenues be accepted as proof of robust competition. It must be recognized that the decline in unit revenues is due more to a change in the mix of services provided, and a shift in the service option chosen, than to an across-the-board drop in rates forced upon the RBOCs by competitive pressures. For example, more and more customers are now subscribing to RBOC volume and term plans, as opposed to the far more expensive month-to-month arrangements. While volume and term plans do decrease RBOCs' average unit revenues, they also lock in existing customers for multiple years, for most or all of their existing demand and, in many cases, at least some portion of any projected growth in demand as well. Numerous commenting parties assert that they subscribe to volume or term plans not because of an overwhelming desire to remain with the ILEC (especially not for 5 years or more), but

[8] *See, e.g.,* Sprint, p. 4 and Attachment 1; CompTel *et al.*, p. 6; Time Warner Telecom, p. 16; XO, p. 6; Ad Hoc, p. 16; *see also*, ATX *et al.* (comparing price flex special access rates to UNE rates).

rather because the rates otherwise available under the month-to-month plans are prohibitively expensive,[9] and because competitive alternatives in specific geographic locations are simply not available. Further, even when competitive alternatives may become available, these special access customers often do not avail themselves of such alternatives because doing so could expose them to punitive revenue or volume commitment shortfall liabilities (*id.*) or onerous migration expense.[10]

Special access customers also are purchasing higher capacity pipes.[11] As customers transmit ever-increasing volumes of traffic and offer more applications that require greater bandwidth, many have found it cost-effective to purchase a big pipe. Other customers may aggregate traffic (by grooming their networks, reselling excess capacity to other special access customers, etc.) and purchase one high capacity facility in place of multiple smaller pipes. Because the increase in price is not proportional to the increase in capacity (one DS3 circuit is not priced at 28 times the DS1 rate, for example), the use of higher capacity pipes will tend to reduce per unit (*e.g.,* DS-1 equivalents) revenues. Here again, the decline over the past 4 years in unit revenues is due more to a shift in market demand characteristics than to price cuts brought about by extreme competitive pressures.

Many IXC special access customers now do use high capacity special access lines for their entrance facilities (*e.g.,* DS3 or OCn facilities to the carrier POP), where economies of scale are possible and greater competitive alternatives are available, but

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[9] *See, e.g.,* Comptel, p. 11; Wiltel, p. 13; Broadwing/Savvis, p. 23; Paetec, p. 9; Time Warner Telecom, p. 17; ATX *et al.*, p. 38

[10] *See, e.g.,* Sprint, p. 6; Wiltel, p. 15; Broadwing/Savvis, p. 25.

[11] *See, e.g.,* BellSouth Attachment 5, which shows a substantial increase in demand for OCn facilities between 2001-2004.

continue to use smaller (*e.g.,* DS1) ILEC facilities to reach the customer premises. This mix-and-match of facilities will reduce the ILEC's average unit revenues to the extent that the starting calculations are based on use of two higher priced DS-1 channel terminations; but, this does not mean that the entire special access market is now fully competitive. Even if a customer does use an alternative access vendor for a portion of its special access needs (interoffice transport or entrance facilities), ILECs remain indisputably dominant in the provision of tail circuits (from their end office to the customer premises, or from the LEC office to a CMRS cell site), because of the relatively low volume of traffic between such points, the time and capital necessary to deploy such facilities, and the risk inherent in such an investment.[12]

The evidence provided in the comments thus suggests that while ILECs are subject to some competitive pressures, pervasive entry and expansion by alternative access vendors has not occurred in all special access market segments. Because competition in the special access market remains uneven, neither complete deregulation as advocated by the RBOCs nor extensive re-regulation as advocated by certain special access customers is warranted. Instead, the Commission should adopt a hybrid approach, allowing ILECs to provide special access pursuant to contract tariffs (outside of price cap regulation) wherever they can negotiate such an agreement with an unaffiliated entity. In all other situations, the Commission should require the ILEC to provide special access services subject to price cap regulation, adjusted to promote an outcome more reflective of a genuinely competitive market.

[12] *See, e.g.,* Sprint, p. 10; Ad Hoc, p. 10 and Attachment B; Broadwing/Savvis, p. 11; Nextel, p. 9; Ad Hoc, p. 11; ATX *et al.,* p. 9; T-Mobile, p. 7.

III. SPECIAL ACCESS RATES SHOULD NOT BE RE-INITIALIZED; HOWEVER, OTHER MODIFICATIONS TO EXISTING PRICE CAP REGULATIONS ARE WARRANTED.

Sprint believes that ILECs that are able to negotiate a special access contract with an unaffiliated entity should be allowed to do so outside the price cap and Part 69 regimes, since negotiations will presumably be successful only if the buyer believes that the package offered by the ILEC is superior to that available under tariff or from other service providers. However, where true competitive alternatives do not exist, ILECs should continue to provide interstate special access services subject to price cap regulation. While some modifications to existing price cap rules are warranted to more closely mimic a competitive market, such modifications do not include re-initialization of existing special access rates to generate a specified rate of return.

Re-initialization of current special access rates is contrary to the public interest for several reasons. First, the Commission simply does not have the information needed to determine a "correct" rate of return. The 11.25% rate of return currently in effect has not been thoroughly evaluated in 15 years, and economic and market conditions (some of which would tend to decrease the rate of return, others of which would tend to increase the rate of return) have changed substantially during that period. Given the lack of up-to-date information, it is unreasonable to state that 11.25% is an appropriate benchmark for purposes of evaluating or establishing special access price cap rates.

Second, it is not at all clear whether the Commission even has the ability to measure "real" (economic as opposed to regulatory) special access rates of return earned by the ILECs. Rate of return information available to the Commission is based on ARMIS, the accuracy and relevance of which has been thoroughly debated. On the one hand, various special access users assert that the RBOCs' extremely high ARMIS-based rates of return prove that the special access market is not competitive.[13] On the other hand, several ILECs have pointed out that ARMIS rules are out-of-date and cause severe revenue and expense mis-allocations.[14] The Commission itself has declined to use category-specific accounting rates of return to adjust price cap rates upwards or downwards (*NPRM*, para. 62). Again, making rate and rate of return adjustments without accurate and relevant information is hardly sound public policy.

Third, because existing Commission rules do not specify a bright line benchmark to separate reasonable from unreasonable rates, re-initialization would be an inappropriate perversion of the productivity incentives inherent in price cap regulation. Requiring price cap carriers to re-initialize their rates in the absence of a benchmark is tantamount to penalizing these carriers for their efficiency and productivity gains, without prior notification of the possibility of such an outcome.

While parties may argue over the relevance or accuracy of the absolute level of reported rates of return, the upward trends exhibited in the ILECs' regulatory rates of return do seem to indicate that they have experienced significant productivity gains over the past several years. Sprint therefore urges that price cap regulation of special access services re-incorporate a 5.3% adjustment factor, the last X-factor to be upheld on judicial review, on a going-forward basis. This factor will push price capped rates closer to levels expected in a competitive marketplace, while presenting an achievable but challenging hurdle for ILECs to meet.

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[13] *See, e.g.,* ATX *et al.,* p. 10; Comptel *et al.,* p. 4; Paetec, p. 5; Wiltel, p. 10; XO, p. 5; Ad Hoc, p. 26.
[14] *See, e.g.,* Sprint, p. 15; BellSouth, p. 7; Qwest, p. 11; SBC, p. 24; Verizon, p. 17.

Other revisions to price cap regulation of special access are also warranted to more closely reflect marketplace realities. As noted by many commenting parties, the degree of competition varies by market segment – there tends to be more competition in the provision of very high capacity (OCn) facilities than of DS3 and below circuits, and more competition in the provision of entrance facilities than of tail circuits to the customer premises. To avoid cross-subsidization of more competitive facilities by less competitive facilities, the Commission should establish separate baskets for special access facilities greater than DS3 capacity, and, in the DS3-and-below basket, separate subcategories for channel terminations used in entrance facilities and tail circuits.[15]

IV. CONCLUSION.

Competition in the special access market is still developing. The Commission should undertake measured reform of special access rate regulation and should

- End the current collocation-trigger-based system for determining when pricing flexibility is granted.
- Grant special access pricing flexibility to an ILEC in any market where it can negotiate a special access contract. The ILEC could offer volume and term agreements or contract tariffs, filed on short notice, and without mandatory compliance with Part 69 special access rate structure rules. However, the ILEC may not offer such contract tariffs to an affiliate unless and until an unaffiliated customer first purchases service pursuant to that contract.
- Bring back under a system of price caps all generally available special access service offerings, initially at their existing rate levels. These services would be subject on a going-forward basis to a 5.3% adjustment factor, as well as an inflation factor and exogenous cost adjustments.
- Establish a new category for special access facilities with capacities greater than a DS3, as well as two new subcategories in the DS1 and DS3 basket for channel terminations: (1) between the LEC end office and the customer premises, and (2) between the carrier POP and the LEC serving wire center.

[15] *See, e.g.,* Sprint, p. 13; ATX et al., p. 28; Nextel, p. 21; Ad Hoc, p. 50; SBC, p. 63 (separate category for DS3 and below channel termination to end users).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **REPLY COMMENTS OF SPRINT CORP.** was filed by electronic mail and copies sent by electronic mail or by United States first-class mail, postage prepaid, on this the 29th day of July 2005 to the parties on the attached page.

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