businesses (SMB) are located within a few hundred feet of the local hybrid fiber/coaxial network,"[104] and that roughly 25 percent already have a cable drop.[105] Each of the nation's major cable operators has broadened its reach to offer high-capacity services to medium-sized businesses and even to large enterprise customers. For example, Cablevision "generated close to $200 million in 2004 with more than 1,600 buildings on net and 150,000 access lines through its Lightpath business services arm."[106] A study by In-Stat/MDR found that 41 percent of "enterprises" and 32 percent of "middle market" businesses were using cable modem service in their main offices for some high-capacity services.[107]

Fixed wireless provides an additional layer of competition. Speakeasy has recently deployed high-capacity fixed wireless services in downtown Seattle, "marking the first time that a true, high-density, point-to-multipoint broadband wireless service will be deployed in a large

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Schoolar, In-Stat/MDR, *Data Nation: Wireline Data Transport Services 2004* at 8 (Dec. 2004) ("SOHO and Small Business segments generally only have one business site. They are likely to use cable modem as their primary access technology. Middle and Enterprise Market firms are more likely to purchase cable modem service to support remote sites or home-based workers."); *id.* at Table 4 (estimating that, as of year-end 2004, there would be over 700,000 cable modem subscribers in the small business and middle market segments and over 130,000 subscribers in the enterprise segment).

[104] J. Shim & R. Read, Credit Lyonnais Securities, *The U.S. Cable Industry – Act I* at 196 (Nov. 20, 2002) (estimating six million SMBs within a few hundred feet); *see also* D. Schoolar, In-Stat/MDR, *Wireline in Decline: US Wireline Services 2004* at 7 & Table 1 (Dec. 2004) (there are an estimated 10.8 million small- and medium-sized businesses nationwide – 2.35 million with 5-99 employees, 88,000 with 100-999 employees, and 8.4 million characterized as small office/home office); Citigroup Smith Barney, *Cable: Capitalizing on the SME Opportunity; Detailed Note* (June 4, 2003) (30 to 50 percent of the small- and medium-enterprise market is located within 50 to 100 feet of existing cable modem networks).

[105] J. Shim & R. Read, Credit Lyonnais Securities, *The U.S. Cable Industry – Act I* at 196 (Nov. 20, 2002) (estimating 2.5 million SMBs passed by existing cable infrastructure); D. Sweeney, *Cable's Plumb Position*, America's Network (July 1, 2002) (Jedai Networks, which develops equipment "intended to enable [cable] MSOs to serve business customers," estimates "that roughly 25% of businesses already have a cable drop, including many in downtown office buildings.").

[106] Michael Harris & Alan Breznick, *Cable Gets Down To Building BusineSS*, Telecommunications Americas at 34 (Mar. 1, 2005).

[107] Kneko Burney, *et al.*, In-Stat/MDR, *Cash Cows Say "Bye-Bye": The Future of Private Line Services in US Businesses* at 19, Tables 9 & 10 (Dec. 2003).

metropolitan U.S. city."[108] Clearwire – owned by wireless pioneer Craig McCaw – has deployed fixed wireless in 10 metropolitan areas,[109] and is now halfway towards completing its goal of deploying service in 20 markets by the end of 2005.[110]

Fixed wireless providers are now operating in nearly 75 MSAs, and fixed wireless spectrum is being sold on a wholesale basis in each of the top 150 MSAs. *See* Table 1.

Table 1. Fixed Wireless Providers Offering Wholesale Services

airBand	"airBand offers a dedicated [wireless] private line . . . as a last mile solution for **carriers** that want to avoid the high costs associated with laying copper or fiber."
Conterra	"Conterra uses licensed microwave spectrum to deliver interference-free bandwidth, easily scalable, and designed and deployed at cost points at or below that of conventional broadband technologies."
First Avenue Networks	"First Avenue Networks is a wireless **carrier's carrier.**" "Each channel within First Avenue's 39 GHz spectrum has 100 MHz available and can carry up to 622 Mbps (OC-12). More typical applications are between 45 Mbps and 155 Mbps (DS-3 to OC-3), but **carriers** leveraging First Avenue's spectrum have access to significant capacity should the need arise." "It has approximately 1.5 billion channel pops between its 24 GHz and 39 GHz spectrum licenses. First Avenue offers nationwide coverage and added depth in major U.S. metropolitan areas, holding nearly 600 MHz of spectrum in the top 75 U.S. markets." "Leveraging our FCC licensed 24 GHz and 39 GHz spectrum, First Avenue's fixed wireless broadband networks provide **carrier-class solutions** ranging from T-1 (1.5 Mbps) to OC-12 (622 Mbps)."
IDT Solutions	IDT Solutions "will rent blocks of the company's wireless spectrum to **other carriers.**" Point-to-Point Spectrum Leasing and Geographic Spectrum Leasing available
NextWeb	NextWeb is "counting on its turnkey offer to entice **landline carriers** to add broadband wireless."
WindChannel	"With a carrier-grade network deployed across thousands of square miles, WindChannel provides **carriers** with the ability to reach their customers wirelessly, effectively solving the 'last mile' challenge."
XO	"XO is rolling out its fixed wireless services directly and through **other carriers** that would resell it to end users. A handful of **smaller carriers** have resold it, says [Mark] Salter [the company's vice president of broadband wireless]."

Sources: See Attachment 7.

Many CLECs are now using fixed wireless to expand their fiber networks. *See* Table 2. Fixed wireless enables these carriers to extend their existing fiber networks quickly and cheaply to off-net customers, and, as XO has stated, to "bypass the Regional Bell Operating Companies

[108] Speakeasy Press Release, *Seattle Space Needle Anchors Speakeasy Wireless Broadband Service, Defining WiMax Future* (May 4, 2005), http://www.speakeasy.net/press/pr/pr050405.php.

[109] Clearwire, *Wireless Broadband: Now Serving*, http://www.clearwire.com.

[110] Dan O'Shea, WCA: *Clearwire Half-Way To 20-City Market Plan*, TelephonyOnline (Jul. 1, 2005), http://telephonyonline.com/home/news/wca_clearwire_satterlee_070105/.

(RBOCs) and provide direct access to our end customers."[111] Indeed, a December 2003 study found that 40 percent of enterprise customers and 23 percent of small business customers used fixed wireless for some high capacity service, with those numbers projected to have grown to 54 percent and 35 percent, respectively, by December 2004.[112]

Table 2. CLEC Use of Fixed Wireless To Extend Fiber Networks	
AT&T	"AT&T has begun deploying [WiMAX] in Middleton, New Jersey, and plans a second-phase rollout at another site later this year, with between 25 to 30 business customers. In 2006, the company plans to roll out WiMAX-style services." "AT&T Managed Internet Service gives Maritz a reliable, redundant Internet connection with a 10-mbps fixed pipe and AT&T-managed router. Last mile connectivity is provided by an innovative 18-gigahertz wireless radio link as part of the company's local loop." (AT&T Case Study, 12/01) "[W]e're looking at all types of technologies that will allow us to bypass the ILECs all together. We're checking out power line, 802.11, fixed wireless and free space optics technologies." (Hossein Eslambolchi, CTO, 12/03)
Cox	"A growing number of [cable] operators are looking at wireless technology as a cost-effective means of reaching a significant share of the commercial market previously thought to be unreachable. 'We're watching wireless development very closely. We're very open to using services to complement what we do and are trialing it now.'" (Bill Stemper, VP, Cox Business Services, 11/03)
Covad	Covad is "looking for ways to extend the copper plant economically and WiMAX is very much a possibility." (Ron Marquardt, Technical Director, 3/04)
XO	"There has been ongoing development of technical equipment and data encryption and compression protocols that permit the use of high bandwidth wireless connections between physical locations that are located within a line of sight across relatively short distances, usually under five miles. This fixed wireless, point-to-point connectivity may, in limited circumstances, allow us to obtain direct network access to our customers' buildings via wireless connection without the requirement of leasing network access from the ILECs." XO, 10-K 2004, Annual Report (03/05).
OnFiber	OnFiber, a wholesale metro fiber provider, is working with fSONA Communications and Terabeam, providers of wireless solutions using FSO technology, to "extend the network" where "cost or geography prohibit the use of fiber infrastructure." (Michael Guess, COO, 10/03)
Terabeam	"We're in trials with just about every major tier-one carrier in this country and with many tier-one carriers outside the U.S." (Dan Hesse, CEO, 4/03)
WilTel	"The combination of fixed wireless connectivity to Extended On-Net and WilTel's managed services creates tremendous opportunities for customers in Tier 2 and 3 markets, because now they can have direct, on-net access to WilTel's robust services in the manner that is most effective for them – be it fiber builds or direct wireless connections." (Tony Tomae, SVP, Marketing, 5/04)
Sources: *See* Attachment 7.	

[111] XO Communications, *Network Details*, http://www.xo.com/about/network/details.html. Likewise, TowerStream advertises that its services offer a means of "bypass[ing] the ILEC's wires altogether," noting that it "provides business-class wireless Internet access to over 700 businesses in five major metropolitan areas, and other broadband fixed wireless providers." TowerStream Press Release, *TowerStream: FCC Ruling To Strengthen Demand for Wireless Broadband Alternatives* (Dec. 17, 2004).

[112] *In-Stat/MDR Private Line Report* at 19, Tables 9 & 10. Many Verizon and MCI enterprise and small business customers use fixed wireless technology or view fixed wireless as a competitive alternative for traditional telecommunications services.

4. Additional Evidence of Special Access Competition

Verizon's and MCI's respective experiences in providing wholesale special access services provides significant additional evidence of the fact that there is extensive competition for these services and that this competition will not be adversely affected by the transaction.

First, independent research that is prepared on Verizon's behalf provides additional confirmation that Verizon faces extensive competition for wholesale special access services. This research shows that a wide variety of competing carriers are winning wholesale customers in Verizon's territory, and that MCI is winning only a small percentage of the time.

With respect to local fiber services, customers report switching to a total of 20 suppliers. This list includes IXCs and CLECs such as **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**; fiber wholesalers such as **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**; cable companies such as **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**; utilities such as **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**; systems integrators such as **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**; and others. Of the instances in which customers reported their preference to switch to a competitive provider, MCI was listed as one of the customer's choices in only **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** total instances – less than 20 percent of the time.

Second, Verizon regularly hears from its carrier customers that they are capable of deploying their own facilities or obtaining them from alternative suppliers in the event that they perceive Verizon's special access prices as too high, and Verizon has offered these competitors additional discounts in an effort to keep these customers on Verizon's facilities. Verizon's carriers customers have indicated, for example, that they compare Verizon's special access prices to those of other competitive suppliers, including traditional competitors such as AT&T, cable companies such as Cox, Comcast, or Cablevision (Lightpath), utilities, and the many other alternative providers described in Section III, below. Some carriers, like **[BEGIN CLEC CONFIDENTIAL]** **[END CLEC CONFIDENTIAL]** have told Verizon that unless it lowers its rates, they will build the facilities themselves or turn to alternative suppliers.[113] Some carriers purchasing special access from Verizon, including **[BEGIN CLEC CONFIDENTIAL]** **[END CLEC CONFIDENTIAL]**, have already begun doing so.[114]

In response to these actions and statements from carrier customers, Verizon designed an additional discount for these carriers to stay on Verizon's network. In particular, Verizon developed a single total billed revenue ("TBR") plan under which these carriers can obtain an additional credit on top of the discounts available under Verizon's other discount plans. Verizon also has adopted more targeted pricing promotions designed to retain its carrier customers.

Although some carriers have chosen to avail themselves of these discounts and have remained on Verizon's network, other carriers have chosen to proceed ahead with their plans to migrate their facilities to competitive alternatives. For example, even after Verizon developed the TBR plan in response to customer concerns, only **[BEGIN CLEC CONFIDENTIAL]** **[END CLEC CONFIDENTIAL]** subscribed to the tariff. **[BEGIN CLEC CONFIDENTIAL]** **[END CLEC CONFIDENTIAL]** presumably both decided to take their business elsewhere. This experience shows that

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[113] *See* Lew Special Access Decl. ¶ 71.

[114] *See, e.g., Wholesale Markets: Revenue Summit* (Feb. 8-10, 2005), VZFCC-075-0000374 at 0000383 ("**[BEGIN CLEC CONFIDENTIAL]** **[END CLEC CONFIDENTIAL]** intended to continue to aggressively construct MANs and/or use CLECs and move circuits away from Verizon").

competition gives carriers the ability to walk away from these contract tariffs in favor of other providers.

Third, Verizon's experience out-of-region confirms that there are a multitude of alternative suppliers of wholesale special access wherever substantial demand exists. In 2003, a Verizon long-distance affiliate issued requests for proposal for high-capacity access services in 28 out-of-region markets. Verizon received responses from eight carriers in addition to the ILEC (but excluding MCI). In evaluating the proposals, Verizon considered the geographic coverage offered by a given provider, price, the bidding carrier's ability to provide interconnection at the Verizon POP, and the bidding carrier's ability to meet Verizon's operational and provisioning requirements.

For *all* of the locations that Verizon evaluated, Verizon had a choice of viable competitors capable of providing strong coverage in areas of highly concentrated demand. In many areas, Verizon determined that at least two viable competitive carriers were capable of providing access services in areas of highly concentrated demand.[115] For example, in Houston, Verizon found two carriers, serving between 100 and 200 buildings, offered strong coverage in the city. Likewise, in Chicago, Verizon found providers that were capable of providing access to more than 70 buildings.[116] Even in smaller locations, there were frequently two or more competitive carriers that provided strong coverage in areas of highly concentrated demand. In Cleveland, three carriers (serving between 40 and 80 buildings) provided solid coverage in areas of highly concentrated demand.[117] *See* Table 3.

[115] Declaration of Robert F. Pilgrim ¶ 12 ("Pilgrim Special Access Decl."), *attached to* Comments of Verizon, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (FCC filed June 13, 2005).

[116] *Id.* ¶ 14.

[117] *Id.* ¶ 15.

In 19 of the 28 areas for which it selected a primary access provider, Verizon contracted with a competitive carrier to be its primary access provider. In three of the six areas in which it also selected a secondary access provider, Verizon chose a competitive provider to be its secondary access provider. Through these carriers, Verizon is now offering high capacity services on a competitive basis in at least 26 out-of-region states.[118]

Table 3. Areas in Which Non-Incumbent Carriers Submitted Proposals To Provide Verizon with Out-of-Region Access Services

Area	Number of Carriers Submitting Proposals	Area	Number of Carriers Submitting Proposals
Atlanta	7	Orlando	3
Austin	4	Phoenix	4
Charlotte	4	Portland (OR)	3
Chicago	5	Raleigh-Durham	3
Cincinnati	4	Rochester	2
Cleveland	3	Sacramento	5
Denver	5	Salt Lake City	2
Detroit	4	San Antonio	3
Fort Lauderdale	2	San Diego	5
Hartford	2	San Francisco	6
Houston	7	Santa Ana	1
Indianapolis	2	Santa Clara	4
Kansas City	2	St. Louis	3
Miami	4	Stamford	3

Source: Pilgrim Special Access Decl. at Table 1.

C. Because the Overlap Areas Represent an Insignificant Fraction of Total Demand, It Is Not Economically Feasible To Discriminate Selectively in Those Areas

Even assuming that some of MCI's local fiber serves locations that are not subject to existing competition or that cannot be readily duplicated, the transaction will not increase Verizon's ability to raise special access prices in response to any reduction in competition at such locations. As a general matter, Verizon's special access prices are highly uniform geographically. It is not feasible for Verizon to increase special access prices based solely on the

[118] *Id.* ¶ 8, Table 1.

competitive conditions at certain isolated locations, and Verizon does not in fact engage in such pricing strategies today, despite the fact that it faces varying levels of competition throughout its region. Even assuming that Verizon were to adopt such a strategy, any locations where MCI has overlapping fiber that is not subject to existing competition or that cannot be readily duplicated are so geographically dispersed and account for such a small percentage of overall capacity and demand that any attempt by Verizon to raise prices in those locations would not be economically meaningful.

1. In theory, putting aside all questions of economic practicality and regulatory constraint, a firm could charge different special access prices in different wire centers, in different buildings, or on different routes, and thereby charge different prices in the overlap areas than elsewhere. Significantly, however, Verizon does not price in that manner in the real world.[119] Despite the fact that Verizon faces vastly different levels of competition at different locations, its pricing is highly uniform geographically.

Under federal regulation, Verizon is permitted to deviate from geographically averaged pricing in two main respects. First, it may charge different prices in different "density zones," because the costs of providing special access can vary significantly based on density.[120] Second, in MSAs where Verizon has obtained pricing flexibility, it may offer service pursuant to contract tariffs specifying volume and term discount plans, provided that they are made available to all

[119] Even the competing carriers opposing this transaction have recognized that Verizon offers special access at geographically uniform prices. Economist Joseph Farrell acknowledged this in a statement he prepared on behalf of competing carrier Global Crossing. Professor Farrell explained than any granular geographic market definition "must be supplemented . . . by a region-wide market definition" in light of the fact that ILEC special access pricing "does not fully respond to such granular conditions, building by building." That fact, he said, "can make region-wide concentration a more important determinant of competitive behavior and overall pricing that concentration and entry possibilities specific to a building or route." Declaration of Joseph Farrell on behalf of Global Crossing ¶ 16, *attached to* Comments of Global Crossing, *SBC Communications and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65 (FCC filed Apr. 25, 2005).

[120] *See* 47 C.F.R. § 69.123(b).

"similarly situated" customers.[121] Verizon offers such special access discounts that are at a minimum region-wide; increasingly the offers are made company-wide. Thus, Verizon offers its discount plans in every MSA within the Verizon filing entity's service territory, including both price cap and pricing flexibility MSAs, and, within each MSA, across wire centers in different density zones.[122] And Verizon has begun offering company-wide discounts in the form of Total Billed Revenue ("TBR") plans, which give customers an additional discount on their special access purchases based on their overall volume of purchases from Verizon regardless of location.

Verizon's decision to maintain geographically uniform pricing is driven by the economics and logistics of competing in the special access market. The major purchasers of special access – not only other carriers, but non-carrier customers as well – typically require service at multiple locations across Verizon's region, and across the country. Verizon's carrier and large enterprise customers invariably purchase special access in multiple MSAs and for multiple locations within those MSAs, with each customer having its own mix of locations.

Any hypothetical areas in which Verizon achieved market power as a result of the transaction would be at best very small in number – of course, even they, at some incremental cost, would be served by rivals not currently nearby – and would represent no more than a small fraction of the services required by any given customer; in most areas, Verizon would, as demonstrated above, face effective competition.[123] The prices of competitors in *all* such areas

[121] *Pricing Flexibility Order* ¶ 69 n.85 ("A contract tariff is a tariff based on an individually-negotiated service contract."); *id.* ("In order to comply with the nondiscrimination provisions of the Act, the Commission has required carriers to make all contract tariffs 'generally available to similarly situated customers under substantially similar circumstances.') (citing *Interexchange Competition Order*, 6 FCC Rcd at 5897).

[122] There are five groups of Verizon "filing entities:" the companies serving (i) the former Bell Atlantic region, (ii) New York, (iii) New England, subdivided into Massachusetts and the other New England states, (iv) the former GTE territory, and (v) the former Contel region. The tariff filing entity for the former GTE and Contel territories is generally the company serving each state.

[123] As demonstrated above, roughly two-thirds of MCI's approximately **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** lit-buildings in Verizon's region are either already served by

provide all the needed discipline on Verizon's pricing, as confirmed by the fact that Verizon does not currently charge building-specific elevated prices. There is simply no sound basis to predict that it would be practical or profitable for Verizon suddenly to begin doing what, even as a theoretical matter, would be needed for this transaction to result in cognizable price exploitation at the few locations at issue in this discussion. To accomplish this, Verizon would have to identify myriad variables: each building that newly lacks a present nearby rival (a changing fact); what customers buy at that location and how much; at what other locations those customers buy services from Verizon, the extent of competition at those other locations, and what Verizon's at-risk revenues are at those locations; how much, if at all, Verizon could raise prices at the initially identified building before those customers would decide (for short-term or long-term self-protection) to use competitive alternatives; and what revenues Verizon would lose from *other* customers – not present at the initially identified building – who responded (by leaving Verizon or paying less) to any newly introduced volume or multi-location terms Verizon introduced. Verizon has not attempted to make these fine-tuned calculations, let alone persuade regulators to allow pricing that would somehow make this approach possible. With the small number of buildings even hypothetically affected at issue, it is not just speculative but implausible on its face that this transaction would lead to such pricing.[124]

2. There are two ways in which, as a theoretical matter, special access prices could be raised to account for the removal of MCI at individual locations, but neither can plausibly be

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a competitive fiber supplier or are within one-tenth of a mile (approximately 500 feet) of an existing CLEC fiber ring, and approximately 86 percent of those buildings are within a half mile of an existing fiber ring.

[124] This is particularly true in light of the fact that special access purchasers are large and knowledgeable customers with every incentive to seek the provider offering the lowest price and best terms and conditions – and to finance initial investments to create new rivals (as Merrill Lynch did for Teleport). *See* Section III.A.1, *infra*. *See also Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶ 66 (1995) (citing First Interexchange Competition Order, 6 FCC Rcd 5880, 5888).

viewed as a likely or practical course of action for Verizon. First, Verizon might attempt to raise its region-wide or company-wide prices to account for the overall effect that the removal of MCI would have at individual locations. Under such an approach, however, there is no way that Verizon could increase its overall prices without running the risk of losing customers who purchase special access service primarily at locations where there are other competitive alternatives besides MCI. If Verizon attempted to raise prices at such locations, customers would begin migrating to those alternative providers – the ones already in place and the ones that would appear if customers demanded. And because competing carriers other than MCI serve many more locations than MCI itself (*see* Section II.A.1, *supra*), such customers are likely to far outnumber the small fraction of customers who may benefit from any unique competition that MCI's fiber currently provides.

The following example illustrates the point. Take two different customers each of which purchases special access at 10 locations. Customer A has competitive alternatives other than MCI at all 10 locations; customer B has competitive alternatives other than MCI at only 9 such locations. If Verizon attempted to raise its special access prices, even customer B will consider switching: it will examine savings it can earn at the 9 locations other than the MCI-only one and will also consider what it might cost to induce new entry at the one aberrant location. At least as important, customer A is even more likely to switch, since it has no locations where alternatives to MCI are lacking. As noted above, there are many more customer As than Bs, itself making the risk to Verizon of any area-wide price hike considerable. And, in any event, it is unlikely that Verizon would successfully be able to perform the calculus required to proceed in this way. Some of Verizon's most important special access customers purchase special access at thousands (or even tens of thousands) of locations, with a wide variety of competitive carriers at those locations, all offering different prices and pricing structures that are not typically made public. Verizon could not even gather the requisite competitive intelligence to effect a successful discriminatory pricing strategy, let alone develop the databases and mathematical formulas that would be needed to implement such a strategy.

Second, Verizon might attempt to implement building-specific pricing in order to raise the prices at the specific locations where MCI is today the sole readily available competitive alternative. This strategy also is highly unlikely to be tried or succeed. Indeed, Verizon's Wholesale Markets has not implemented any targeted elevation of pricing at particular buildings, and there are good reasons this transaction cannot be viewed as leading to such pricing.

Wholesale Markets has not implemented any building-or route-specific pricing to date. Verizon implemented "specialty pricing" for intrastate retail private line service approximately 2 ½ years ago (calling it "win cities"), but that pricing is inapplicable to the vast bulk of "special access" (which is *federally* tariffed), is one of *discounts*, and is not actually building-specific (though some of Verizon's tariffs describe it as such). Under this program, Verizon offers certain discounts to retail customers that are in "qualified" buildings, "qualified" meaning that "twenty-five percent or more of the voice and/or data accounts in the building are served by a carrier other than Verizon."[125] That qualification applies no matter how many rivals there are supplying, or able to supply, special access to the building, and hence whether MCI is the sole provider or there are several others.[126] Unlike true building-specific pricing, Verizon's specialty

[125] PSC NY No. 1 – Communications, § 1.A.9.5 (effective Jan. 31, 2003).

[126] Verizon has filed tariffs for specialty pricing (which the tariffs refer to as "Business Building Specific Pricing (BBSP) Arrangements") in two states (New York and Pennsylvania), but Verizon also uses specialty pricing pursuant to individually negotiated contracts in California, Florida, Oregon, Texas, Washington, District of Columbia, Massachusetts, Maryland, New Jersey, Rhode Island, and Virginia. In some states (such as Massachusetts), Verizon is required to file these contracts with state regulators prior to their taking effect; in other jurisdictions (such as D.C.), Verizon is required to file summary reports of such contracts on a quarterly or annual

pricing offers uniform prices at all buildings that meet the relevant customer-loss criteria. Thus, for example, Verizon estimates that there are approximately 8,000 buildings in New York alone that qualify for specialty pricing, and the prices offered at these buildings are the same whether the building is served, or capable of being served, by one, two, three, or more providers of special access services.

Verizon's rationale for adopting this approach indicates why it would be infeasible to charge different rates at different buildings, and thereby discriminate at the buildings where MCI currently has fiber. Under price-cap regulation, which governs a significant portion of Verizon's special access services, Verizon does not have the ability to establish building-specific pricing. To the extent Verizon has qualified for pricing flexibility, Verizon must nevertheless file any contracts that it negotiates with individual customers with the FCC as generally available tariffs. Furthermore, under all circumstances, Verizon remains subject to the requirement that its prices be just, reasonable, and non-discriminatory. If Verizon attempted to establish widely divergent prices for individual buildings, it potentially would face complaints from other customers as well as competing carriers arguing that the building-specific discounts were unjustly discriminatory and had to be extended to all. These regulatory concerns provide an additional reason not to establish building-specific pricing.

Moreover, even if Verizon were able to overcome the logistical difficulties of offering building-specific prices, any attempt to use this strategy to *raise* prices in the overlap areas would be subject to competitive response and regulatory scrutiny. In general, Verizon must

basis; and in other states (such as New Jersey and Pennsylvania), Verizon is not subject to any applicable filing requirements. Verizon also offers what it calls "urban specialty pricing" – which offers lower prices than ordinary specialty pricing in qualified buildings in concentrated downtown areas – in four states (New York, Pennsylvania, Massachusetts, and Maryland).

charge the same rates to similarly situated customers.[127] Thus, in order to justify different pricing to customers at different locations, Verizon must be able to prove that those customers are not similarly situated. FCC precedent dating back two decades restricts a *competition*-based differentiation of special access customers to circumstances (the "competitive necessity doctrine") where the ILEC can demonstrate that "(1) equally or lower priced competitive alternatives are generally available to customers of the discounted offering; (2) the discounted offering responds to competition without undue discrimination; and (3) the discount contributes to reasonable rates and efficient services for all users."[128] By its terms, this exception to non-discrimination requirements exists only where an ILEC is seeking to *lower* special access prices in response to competition; the competitive necessity doctrine may not be used to justify an increase in special access prices under any circumstances.

Any attempt to effect a selective rate increase would be transparent. At least insofar as interstate special access services are concerned (which constitute the bulk of all special access that Verizon provides), all price changes must be filed with the FCC, which then has the opportunity to review those changes. To the extent that Verizon attempts to structure a price change designed to raise prices in isolated areas where special access competition was not readily available, such a price change would be transparent to regulators, and for that reason it would make little sense even to attempt it.

Consistent with these realities, to the extent that Wholesale Markets considered more granular pricing, it did so solely in order to *lower* its special access prices in response to

[127] 47 U.S.C. § 202(a); *see also* Verizon Response to FCC Specifications, Exhibit 7 (summarizing state requirements).

[128] *Private Line Rate Structure and Volume Discount Practices Guidelines*, Report and Order, 97 FCC2d 923, 948 (1984).

competitive threats, not to raise prices where such threats may be less pronounced.[129] Similarly, Verizon's specialty pricing for intrastate private line services offers lower prices, based on certain customer-loss thresholds. Verizon implemented this pricing in an attempt to retain and win back customers that it was losing to competition. To date, however, Verizon has had only limited success with these initiatives.

D. MCI's Resale of Verizon's Special Access Is Not Competitively Meaningful

As noted above, MCI is a major purchaser of special access from Verizon, and uses that special access to serve many locations that MCI's local fiber networks do not reach. MCI also uses Verizon special access on a very limited basis to provide Metro Private Line Service. Only about **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** of MCI's total wholesale revenues for Metro Private Line services (roughly **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** in the Verizon East region) are earned from providing Type II circuits where MCI uses ILEC special access for the channel termination to extend MCI's network to an off-net building.

Despite the insignificant extent to which MCI actually resells Verizon special access to other carriers, some merger opponents have argued that MCI is uniquely suited to act as a wholesaler in this capacity. In particular, these opponents claim that MCI, because of its large base of customers, is able to obtain larger discounts than smaller carriers could on their own, and is able to pass those discounts on to such carriers. In fact, MCI has no unique capabilities in this regard.[130]

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[129] *See 2005 Standard Business Case Template – Narrative* (Aug. 23, 2004), VZFCC-075-0000562 at 0000568, 0000572.

[130] *See Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 353 (5th Cir. 1980) (pure reselling is "more akin to mere 'substitution' than to competition"); *Hypoint Technology, Inc. v. Hewlett-Packard Co.*, 949 F.2d 874, 878 (6th Cir. 1991) (a mere reseller is a "'non-competitive middleman'").

As an initial matter, most of the volume plans that Verizon offers provide discounts based on the extent to which a customer commits to maintain a minimum percentage of its pre-existing special access expenditures with Verizon.[131] Such plans do not offer customers greater discounts for greater volumes, and most of these plans provide no greater discount than is available under plans that do not contain such a requirement.[132] The one exception to this are the Total Billed Revenue plans that Verizon has recently introduced, principally in response to competing carriers threatening to stop purchasing special access from Verizon and to use competitive alternatives instead. *See* Section II.B.4, *supra*. Under these plans, Verizon provides carriers a credit at the end of the year if their total purchases of certain special access services exceed certain revenue thresholds. With the exception of one TBR plan that is designed for smaller carriers and that is purchased by only one such carrier (**[BEGIN CLEC CONFIDENTIAL]** **[END CLEC CONFIDENTIAL]**), Verizon has implemented TBR plans only for a subset of special access services – its Facilities Management Service ("FMS").[133] **[BEGIN CLEC CONFIDENTIAL]**

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[END CLEC CONFIDENTIAL]

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[131] *See* Lew Special Access Decl. ¶¶ 90-94.

[132] *Id.*

[133] *Id.*

[134] The TBR plan under which MCI purchases is structured differently from the one under which **[BEGIN CLEC CONFIDENTIAL]** **[END CLEC CONFIDENTIAL]** purchase. The former calculates a discount based solely on FMS purchases, whereas the latter calculates a discount based on the combination of FMS and total special access purchases.

MCI is by no means uniquely situated in it ability to obtain volume discounts such as those available under the TBR plans.[135] Other competing carriers could choose to enter this business and obtain those same discounts. In fact, there are many competing carriers that already have wholesale operations.[136] Competing carriers also are collocated in the same wire centers as MCI, which puts them in the same position to offer wholesale special access in the same locations as MCI to the extent that collocation is viewed as prerequisite to serving a customer using special access in a given wire center. In particular, of the approximately **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** wire centers in Verizon's region in which MCI has obtained fiber-based collocation, there is one or more competing carrier with fiber-based collocation in 96 percent of those wire centers[137] and two or more competitors with fiber-based collocation in 90 percent. And there is no need even to operate as a carrier to enter this business – at least two companies, Global Internetworking and Last Mile Connections, have recently entered the business as wholesalers.[138] By aggregating the demand of multiple carriers, these carriers qualify for the maximum tariffed discounts, and then pass those discounts on to smaller carriers.

The fact that other competing carriers are just as capable of competing using special access as MCI is further demonstrated by the fact that these other carriers already are doing so more extensively than MCI. Verizon reviewed its wholesale special access billing records in two MSAs – Albany and Baltimore – to determine the total number of individual building addresses

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[135] *See* Lew Special Access Decl. ¶¶ 67, 73 (describing fact that Verizon's TBR plans are available to all carriers).

[136] *See* Reply Declaration of Quintin Lew ¶¶ 7-15 ("Lew Reply Decl."), *attached to* Joint Opposition of Verizon Communications Inc. and MCI, Inc. to Petitions To Deny and Reply to Comments, WC Docket No. 05-75 (FCC filed May 24, 2005).

[137] Lew/Lataille Decl. ¶ 24.

[138] *See id.* ¶ 61.

at which it provides special access to competing carriers.[139] Within these MSAs, Verizon analyzed data only for the limited subset of wire centers in which MCI has deployed fiber, which represent only a small fraction of the total wire centers in these MSAs.[140] In both cases, the data show that competing carriers collectively serve substantially more locations than MCI itself. With respect to the areas analyzed in the Baltimore MSA, competing carriers excluding MCI serve a total of **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** locations, whereas MCI serves only **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**. In the Albany MSA, competing carriers excluding MCI serve a total of **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** locations, whereas MCI serves only **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**.

E. Verizon's Special Access Prices Are Constrained by Regulation

Because virtually all of the special access that Verizon and other carriers sell is interstate, the FCC has jurisdiction over the rates, terms, and conditions at which special access is sold. Since 1999, the FCC has regulated Verizon's interstate special access through two different regulatory regimes: price caps, which date back to 1990, and pricing flexibility, which was instituted in 1999.[141] The FCC has granted pricing flexibility to local exchange carriers to enable them to "respond to the advent of competition" in the market for the high-capacity services

[139] These represent two of the six MSAs in which Professor Simon Wilkie claimed that MCI and AT&T served more locations that other competitive providers. These MSAs were selected from the group because the process of analyzing wholesale billing records is very labor-intensive, and these two MSAs are smaller, and therefore have a smaller dataset, than the other four.

[140] Verizon limited its analysis to this subset of wire centers because, Verizon had previously extracted detailed billing records for those wire centers in which MCI has deployed fiber to buildings, and it is very labor intensive to pull this type of data. The subset of wire centers that Verizon analyzed represent fewer than 10 percent of the wire centers in the Albany metropolitan area, and approximately 30 percent of the wire centers in the Baltimore metropolitan area.

[141] *See Pricing Flexibility Order* ¶ 14.

provided over special access facilities, recognizing that, "as the market becomes more competitive, [the] constraints [of price cap regulation] become counter-productive."[142]

To obtain all of the pricing flexibility that the FCC permitted, Verizon must make "certain competitive showings," based on the extent to which other carriers have established fiber-based collocation in Verizon's wire centers in a metropolitan statistical area ("MSA").[143] "Phase I" relief, which permits Verizon to offer contract tariffs and volume and term discounts, is available for both transport facilities within Verizon's network and the entrance facilities that connect Verizon's network to another carrier's network in MSAs where other carriers have established fiber-based collocation in 15 percent of the wire centers in the MSA, or in wire centers accounting for 30 percent of Verizon's revenues for special access transport in that MSA.[144] Phase I relief is available for channel terminations, which are the facilities that form the "last-mile" connection to an end-user customer's premises, in those MSAs where other carriers have established fiber-based collocation in 50 percent of the wire centers in the MSA, or in wire centers accounting for 65 percent of Verizon's revenues for special access channel terminations in the MSA.[145] "Phase II" relief, which permits Verizon to offer special access prices without regard to the FCC's price cap rules, requires Verizon to satisfy higher thresholds of fiber-based collocation.[146] Thus, in a given MSA, Verizon may have obtained Phase I relief for channel terminations and Phase II relief for transport, or no relief for channel terminations, but Phase I

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[142] *Pricing Flexibility Order* ¶¶ 14, 19.

[143] *Id.* ¶ 24; *see id.* ¶ 25. The MSA definition for pricing flexibility is based on the list of markets used for cellular service, rather than the geographic entities established by the Office of Management and Budget. *See* 47 C.F.R. § 69.703(b) (citing 47 C.F.R. § 22.909(a)).

[144] 47 C.F.R. § 69.709(b).

[145] 47 C.F.R. § 69.711(b).

[146] 47 C.F.R. §§ 69.709(c) & 69.711(c).

relief for transport. Regardless of whether Verizon has obtained Phase I or Phase II relief in an MSA, Verizon remains subject to statutory and regulatory non-discrimination requirements.

Since 2000, Verizon has filed five separate petitions for pricing flexibility, the most recent in January 2005. The FCC has granted all of those petitions, with the result that Verizon has obtained some form of pricing flexibility in 73 MSAs in which it operates as the ILEC.[147] Those 73 MSAs account for **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** percent of all of Verizon's special access revenues. Specifically, Verizon has obtained Phase II relief for transport in 62 MSAs and for channel terminations in 26 MSAs. Verizon has obtained Phase I relief in an additional 11 MSAs for transport and 27 MSAs for channel terminations. Because the FCC's test only counts fiber-based collocation – and, therefore, does not give any weight to the competitive fiber networks that operate in Verizon's region but do not collocate in Verizon's wire centers – Verizon has been unable to obtain Phase II pricing flexibility for end-user channel terminations in some of the most competitive MSAs in the nation, including New York, Boston, Philadelphia, and Washington, D.C. In the areas where Verizon has not obtained any pricing flexibility relief, it remains subject to the FCC's price cap regulation, which establishes pricing ceilings and pricing bands that constrain the rates Verizon may charge for special access services.

In both pricing flexibility and price cap areas, moreover, Verizon remains subject to the FCC's rules that require Verizon to permit competitors to obtain unbundled access, at TELRIC rates regulated by state public utility commissions pursuant to standards the FCC has established, to high-capacity loops and transport at the DS1 and DS3 capacity levels.[148] For high-capacity

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[147] This includes 66 MSAs and seven non-MSA markets.

[148] Although Verizon has challenged these rules as unlawful, Verizon will still be required to provide unbundled access to high-capacity UNEs in all instances except where the D.C. Circuit and the FCC conclude that

loops (roughly equivalent to channel terminations), this unbundling obligation exists except in those wire centers with an extremely high number of business lines (38,000 or 60,000) and where at least three or four competitors have already established fiber-based collocation arrangements. For unbundled dedicated transport (roughly equivalent to special access transport), Verizon must make DS1 and DS3 circuits available on an unbundled basis except where the wire centers on both ends of the circuit satisfy a business line test (24,000 or 38,000) or a fiber-based collocation test (3 or 4).

With respect to UNE high-capacity loops, only 26 of the 6,300 wire centers where Verizon bills high-capacity special access – less than half of one percent – satisfy the higher criteria (60,000 lines and 4 collocators), and where DS1 and DS3 loops are not available on an unbundled basis. An additional 27 wire centers satisfy the other criteria (38,000 lines and 3 collocators), and DS3 loops are not available on an unbundled basis in those wire centers, but DS1 loops are. Only 168 of the 6,300 wire centers where Verizon bills high-capacity special access meet the more stringent test and are classified as "Tier 1" wire centers; the FCC's rules do not impose any unbundling requirement for dedicated transport between two Tier 1 wire centers. An additional 101 wire centers meet the other criteria and are classified as "Tier 2" wire centers; the FCC's rules require Verizon to make DS1 dedicated transport circuits, but not DS3 circuits, available on routes between a Tier 2 wire center and a Tier 1 or Tier 2 wire center. Therefore, even in MSAs where Verizon has obtained Phase II pricing flexibility for both transport and channel terminations, there are wire centers in those MSAs in which Verizon must still make

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other carriers would be impaired without access to such UNEs. Thus, to the extent that Verizon obtains further relief from existing unbundling obligations, it would only be because of findings that UNEs are not needed for other carriers to compete.

high-capacity loops available as UNEs, or between which Verizon must still make dedicated transport available as UNEs.

Finally, as noted above, federal law and FCC regulations prohibit Verizon from charging higher rates for special access to competing carriers than it charges itself. In the specific context of special access services, Congress has required that Bell Operating Companies (which Verizon is in the former Bell Atlantic and NYNEX territories) fulfill requests from unaffiliated carriers within the same time and at the same price that it provides such service to itself.[149] FCC rules also prevent Verizon from offering a new contract tariff for special access service to one of its long-distance affiliates until Verizon "certifies to the [FCC] that it provides service pursuant to that contract tariff to an unaffiliated customer."[150] For these reasons, Verizon will not be able to give MCI any discounts on special access services that are not available to – and, in fact, already utilized by – other unaffiliated carriers. Indeed, Verizon and MCI's estimates of the synergies to be realized from this transaction do not assume that any "savings" will result from MCI obtaining special access at lower prices than it does today.

III. THE VERTICAL ASPECTS OF THE TRANSACTION WILL NOT CAUSE ANTICOMPETITIVE EFFECTS FOR RETAIL SERVICES THAT USE SPECIAL ACCESS AS AN INPUT

As the Department of Justice and leading antitrust authorities have recognized, "non-horizontal mergers are less likely than horizontal mergers to create competitive problems."[151] Indeed, "[m]ost instances of vertical integration, including those that result from merger, are economically beneficial. As a result, the presumption in favor of vertical mergers should be

[149] *See* 47 U.S.C. § 272(e)(1), (3).

[150] 47 C.F.R. § 69.727(a)(2)(iii).

[151] Non-Horizontal Merger Guidelines § 4.0.

stronger than the presumptions favoring horizontal mergers."[152] Opponents of the transaction have nevertheless argued that the combined entity's increased vertical integration may raise competitive concerns. They claim that Verizon will have an incentive and the ability to discriminate against rival sellers of retail services in the provision of special access, thus enhancing market power in that downstream market.

As a general matter, however, the claim that vertical integration confers a competitive advantage to the integrated entity raises no concerns under the antitrust laws. A vertically integrated provider has no antitrust obligation to treat unaffiliated entities the same as it treats itself. To the contrary, where firms have "establish[ed] an infrastructure that renders them uniquely suited to serve their customers," "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."[153] Even though regulators may demand such equality of treatment, vertical integration may raise concern under the antitrust laws only if the vertically integrated firm uses its position as a monopoly supplier of a needed input to foreclose competition in downstream markets.[154]

In evaluating the proposed transaction's impact on competition for retail services that use special access as an input, the relevant question is whether, by combining the two firms' facilities and business capabilities, the transaction will substantially increase the combined

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[152] 4A Areeda, Hovenkamp & Solow, *Antitrust Law* ¶ 1020 (rev. ed. 1998).

[153] *Verizon v. Trinko*, 540 U.S. 398, 407-08 (2004).

[154] *See Trinko*, 540 U.S. at 415 n.4. *Cf.* Brief of the United States, *United States v. Western Elec. Co.*, No. 87-5388 (D.C. Cir. filed Apr. 17, 1989) (noting that cross subsidy of non-regulated services by misallocating costs to regulated services is a regulatory concern, not a competitive concern, unless it "driv[es] out . . . competitors and prevent[s] new entry"). *See also* 4A Areeda, Hovenkamp & Solow, *Antitrust Law* ¶ 1004a (rev. ed. 1998).

entity's incentive or ability to harm competition for these services. There is no serious risk of that happening here, for two basic reasons. The combined entity's *ability* to drive out competitors or prevent entry is constrained both by existing and potential wholesale special access competition and the combined entity's reliance on special access purchases from unaffiliated competitors out-of-region. And the combined entity's *incentives* to attempt to foreclose competition are limited by the business interest in preserving special access revenues and in ensuring reasonable prices for special access facilities purchased from other providers.

A. The Transaction Will Not Enhance the Combined Entity's *Ability* To Foreclose Competition in Retail Markets

1. Opponents of the transaction typically argue that, after the transaction, the combined entity will have greater ability to foreclose other retail providers by raising prices for special access. This claim is contrary to the evidence. As described in detail above, Verizon faces substantial competition in the supply of special access in areas where MCI itself owns special access facilities. Downstream purchasers of wholesale special access can rely on a variety of sources, including self-supply. *See* Section II.B, *supra*. If the combined entity attempted to raise special access prices to downstream providers, wholesale customers would turn to competitors or would themselves achieve vertical integration by investing in their own capacity or combining with competitive providers. In areas where demand for special access is greatest, competition is also (unsurprisingly) most intense.

Most important for purposes of evaluating the vertical effects of the proposed transaction, there is no basis for the claim that adding MCI's local network facilities will have any substantial impact on the combined entities' ability to prevent competition by unaffiliated retail providers. As described above, MCI has local fiber networks that are wholly or largely located in Verizon's traditional service territory in just 19 MSAs. *See* Section I.B.1, *supra*. These facilities are concentrated in a relatively small number of wire centers. By contrast, MCI serves the overwhelming majority of its customers by purchasing special access from unaffiliated providers. Thus, while MCI has deployed fiber to about **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** buildings – office buildings and central offices – it serves approximately **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** customer locations using third-party special access (including **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** within the metropolitan areas in which MCI operates local networks). Thus, the geographic scope of MCI's special access facilities is simply too limited relative to Verizon's existing in-region local network to contribute significantly to the combined entity's power in the provision of special access.

Given the existence of extensive special access competition in areas where MCI has deployed facilities, as well as the prospect of additional competitive entry in areas of concentrated demand, the transaction would not contribute to the combined entity's ability to foreclose retail enterprise competition by raising special access prices. Instead, retail competitors could turn to third party suppliers for special access, or could deploy competitive facilities of their own, just as they do today. Even if the combined entity were to adopt a strategy of raising price only on routes where there was little existing wholesale competition, it would be constrained "by the realization that its 'unreliability' as a source of supply will lead to the permanent loss of the patronage" of wholesale customers.[155]

Furthermore, the claim that the combined entity would have the ability to foreclose retail competition ignores the fact that enterprise customers require special access-type connections not just in one region, but nationwide and internationally as well. Even if, contrary to the evidence,

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[155] *Id.* ¶ 1003b4, at 153.