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Federal Trade Commission/Office of the Secretary
Room H-135 (Annex B)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Broadband Connectivity Competition Policy Workshop – Comment, Project No. V070000

Dear Mr. Clark:

Sprint Nextel Corporation (“Sprint Nextel”) respectfully submits its comments regarding broadband connectivity competition, which the Federal Trade Commission (“FTC”) is considering in the above-referenced workshop. At the workshop many parties focused on an alleged market failure that they believe must be addressed with an improperly labeled “Net Neutrality” obligation. Such a focus, however, is greatly misplaced. Herein, we address and provide hard evidence of the real market failure that seriously threatens the rapid and widespread deployment of broadband networks. This market failure – in the provision of special access services that are essential to the construction and operation of broadband networks – must be addressed by regulators to ensure the continued growth of a vibrant, competitive broadband market.

We also explain herein that there is no similar market failure requiring regulatory intervention in the provision of retail broadband connectivity services today. As will be demonstrated, consumers have more than sufficient choices for broadband access and prices are constrained by the existence of these choices. Rather than focus on an *alleged* market failure in a growing and evolving market with multiple competitors, we urge regulators to focus instead on the *real* and well-proven market failure that exists in the underlying special access services market.

A. The Continuation Of A Vibrant, Competitive Broadband Market Is Dependent Upon A Properly Functioning Market For Special Access Services.

The broadband services market has multiple retail service offerings and therefore is subject to competition from various providers and technologies, including cable, wireline,

powerline, satellite, and wireless technologies.¹ There is a market failure, however, in an essential input to the provision of broadband connectivity services: special access. Special access service provides the “last mile” connections and local transport links that are used by carriers to provide telecommunications and information services. Specifically, “special access” refers to dedicated circuits that connect two defined points within or on a carrier’s network. Special access is used by wireless carriers to connect their cell towers to their switches; by long distance carriers, competitive local exchange carriers (“CLECs”) and wireless carriers to connect their networks with the networks of incumbent local exchange carriers (“ILECs”);² by long distance carriers to connect office buildings to their long distance networks; and by broadband providers to connect office buildings/campuses/hotels to Internet backbone networks. As carriers’ bandwidth requirements grow to accommodate the increasing broadband speeds demanded by consumers, more special access circuits (*i.e.*, more capacity) will be required to transmit the traffic from, for example, Sprint Nextel’s 4G broadband cell sites back to the Sprint Nextel network.³

Despite the fact that special access services are an essential component of broadband networks (*i.e.*, a wireless system cannot function if the cell sites are not connected to the network so traffic can be transmitted from the “air” back to the network switch), competition in the special access market is *de minimis*.⁴ To the extent competition exists at all, it is limited to the

¹ Sprint Nextel is at the forefront of the industry in deploying wireless broadband technology. Sprint Nextel now offers wireless broadband connectivity to more than 200 million people in the United States. Sprint Nextel’s broadband deployment is utilizing EV DO (Evolution Data Only) technology, including EV DO-Rev0 and EV DO-RevA. In addition, Sprint Nextel is investing in 4G (fourth generation) wireless broadband utilizing WiMAX mobile technology. We intend to launch 2.5GHz mobile WiMAX broadband service capable of serving 100 million people by year-end 2008 with trial markets launched later this year in Washington D.C., Baltimore, and Chicago.

² Sections 251 and 252 of the Communications Act 47 U.S.C. §§251 & 252, and the FCC rules issued thereunder require ILECs to provide interconnection facilities to CLECs and wireless carriers at cost-based rates. However, the ILECs have refused to provide cost-based interconnection to the CLECs and wireless carriers. Rather, they have required these carriers to use special access to interconnect to the ILECs’ networks. Given that the rates for special access are excessive, *see* discussion, *infra*, the ILECs’ insistence that CLECs and wireless carriers use special access inflates their costs of interconnection and thereby harms their competitive position vis-à-vis their ILEC rivals.

³ Sprint Nextel and other users of special access services do not self-provision these connections because it is not economical at the current or anticipated levels of demand. As noted by the Federal Communications Commission in the *Triennial Review Remand Order*, “Competitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities. The costs of loop construction are fixed, meaning that they are largely independent of the particular capacity of service that a customer obtains at a particular location.” *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, *Order on Remand*, 20 FCC Rcd 2533, at ¶ 150 (2005) (*Triennial Review Remand Order*).

⁴ For example, of the 3 million large office buildings/campuses nationwide that use large special access circuits (*i.e.*, large “pipes”) for transmitting traffic to and from their locations – or perhaps between multi-state locations of a large national corporation – only about 22,000 use special access services provided by someone other

offering of high capacity special access circuits in densely populated markets. The fact is that the provision of special access services is the exclusive preserve of the ILECs in general and of the two largest remaining Regional Bell Operating Companies (“RBOCs”) – AT&T and Verizon – in particular.⁵ AT&T and Verizon combined have over an 82 percent share of the nationwide ILEC special access market as measured by revenues. The vast majority of buildings and cell sites throughout the country have access to only one provider of these essential inputs – either AT&T or Verizon.⁶

The near monopoly market shares enjoyed by the ILECs in the provision of special access services would not necessarily be problematic had the Federal Communications Commission (“FCC”) continued to regulate the rates charged by the ILECs for special access. However, in what has proven to be a triumph of hope over reason, in 1999 the FCC issued a decision in which it decided that it would deregulate an ILEC’s special access services offerings in any metropolitan statistical area (“MSA”) where the ILEC could show certain so-called “competitive triggers” had been met.⁷ These triggers, however, were not based on the number of competitors actually providing special access services to the buildings and cell sites in a particular MSA. Rather, they were based solely on the number of competitors that had simply collocated their own facilities at wire centers in an MSA – whether or not those competitive facilities could or would be used for the provision of competitive special access services. The FCC found this “was a good predictor that competitors had made significant, irreversible sunk investments in facilities, and indicated *the likelihood* that a competitor *could eventually* extend

than the ILEC. See “*Lessons from the United States Brief Experiment in Telecommunications Competition*,” Presentation by Lee L. Selwyn, Economics and Technology, Inc. to the Canadian Telecommunications Review Panel, October 25, 2005.

It also should be noted that any degree of competition in the special access market was greatly diminished by the acquisitions of AT&T by SBC and MCI by Verizon in 2005 and the acquisition of BellSouth by AT&T in 2006. In all instances, these mergers eliminated the most significant competitor to the ILEC, and the divestitures required by the Department of Justice in the former mergers and the conditions imposed by the Federal Communications Commission in all mergers are clearly insufficient to regenerate the competition lost by the combinations.

⁵ The Government Accountability Office (GAO) recently reported to Congress that “[d]ue to increasing data transmission needs” special access services “are a growing segment of the telecommunications market and represented about \$16 billion in revenues in 2005 for the [RBOCs].” GAO Report to the Chairman, Committee on Government Reform, House of Representatives, “*FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*,” November 2006 at 1 (“GAO Report”).

⁶ See, e.g., GAO Report at 12 & comments filed in *Special Access Rulemaking (Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *Order and Notice of Proposed Rulemaking*, 20 FCC 1994 (2005)).

⁷ *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 (1999) (*Pricing Flexibility Order*), *aff’d Worldcom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001). Although special access services are still subject to Title II of the Communications Act, under the deregulation permitted by the FCC, the ILECs have the discretion to price their special access services as they see fit.

its own network to reach its customers.”⁸ Thus, the FCC believed, “sufficient sunk investments of this sort would constrain monopoly behavior” by those ILECs whose special access services had been deregulated.⁹

Since the decision was issued, the RBOCs have achieved special access deregulation in most MSAs. Had the FCC monitored the special access market to determine whether its “competitive triggers” were appropriate, it might have uncovered the market failure that is now plaguing the special access market. Unfortunately, the FCC has not done so. In fact, it took the FCC nearly three years to institute a rulemaking in response to a petition that legacy AT&T had filed in 2002 asking the Commission “to examine whether [special access deregulation] should remain intact or be revised.”¹⁰ Although the comment cycle has been completed since the summer of 2005, the FCC has not issued a decision or so much as suggested that a decision is imminent.

In the meantime, given that significant competition in the special access market has not materialized despite the FCC’s predictions, there are no competitive constraints on the RBOCs’ pricing behavior. Instead of being forced by the market to price their special access services at or near marginal costs, they have been able to use their pricing flexibility to extract monopoly rents from their competitors in the wireless, long distance and Internet broadband access markets.¹¹ Although the RBOCs would argue otherwise, the “proof is in the pudding.” Over the last several years the returns realized by the RBOCs from their provision of special access were excessive and totally inconsistent with the notion that the special access market is competitive. For example, in 2004, the then-existing three largest RBOCs – AT&T (*nee* SBC), BellSouth, and Verizon – achieved rates of return of 73.02%, 81.90%, and 31.64%, respectively. In an effectively competitive market, returns of this magnitude would certainly have attracted entry. Apparently, there has been none because in 2005, the returns of these RBOCs were even higher: AT&T’s return was 91.73%; BellSouth’s return was 98.37%; and Verizon’s return was 41.97%.¹²

⁸ GAO Report at 3 (emphasis added); *Pricing Flexibility Order*, 14 FCC Rcd at 14261.

⁹ GAO Report at 3; *Pricing Flexibility Order*, 14 FCC Rcd at 14261.

¹⁰ The *Special Access Rulemaking* was instituted in January 2005.

¹¹ In some MSAs, the RBOCs remain under price cap regulation. Yet the RBOCs are able to realize monopoly rents in such markets. This is so because the FCC’s current price cap formula for special access services does not require the RBOCs to reduce their price ceilings to take into account decreasing costs and increasing productivity. This point is particularly important because it also highlights the flaw in the RBOCs’ argument that there is no problem with special access prices because revenues per unit of capacity are declining. Such a statistic takes no account of the declining costs and increasing productivity in the industry.

¹² These returns are based on data set forth in FCC Report 43-01, Table I Cost and Revenue, Column (s) Special Access, Row 1915 Net Revenue divided by Row 1010 Average Net Investment.

To further exacerbate the problem, the largest providers of special access service – AT&T and Verizon – are integrated incumbent LECs. That is, they offer wireline, wireless, and broadband Internet access services. As a result of their dominant position, AT&T and Verizon have both the ability and the incentive to raise the costs of other providers of retail wireline, wireless, and broadband Internet access service. Similarly, because of their dominance in the provision of special access, AT&T and Verizon possess the incentive and ability to discriminate effectively against their competitors in the provision of special access services. The resulting differences in price and provisioning of the retail services could cause customers to opt for the retail offerings of AT&T and Verizon over those of their competitors.

The FCC has authority over both the pricing and the terms and conditions of special access services. However, as Chairman Majoras pointed out in her August 21, 2006 luncheon address at the Progress and Freedom Foundation's Aspen Summit, one of the FTC's responsibilities "is to protect ... vital competition" by, *inter alia*, "rooting out anticompetitive business conduct." If the FTC is to meet its responsibility in this regard, it must urge the FCC to fulfill its statutory mandate of preventing the anticompetitive exploitation of market power by the ILECs in their provision of special access services. The FTC's workshop on "Broadband Connectivity Competition Policy," provides an excellent forum to highlight the problem of dominance over an essential input to the provision of broadband connectivity services. If government regulators successfully constrain the ILECs' market power over special access services, it will provide a major impetus for the increased deployment of broadband access networks throughout the country.

B. Unlike The Monopolized Special Access Services Market, The Broadband Internet Access Services Market Is Defined By Several Providers And, As Such, Suffers From No Market Failure

In contrast to the monopoly special access services market, there is no indication that any provider has – and can act upon – market power in the rapidly evolving broadband Internet access market today. The Internet access market is characterized by numerous facilities-based participants, including cable operators, telecommunications carriers, wireless providers, and satellite and powerline providers, and there is significant potential for further entry, particularly as the FCC auctions more spectrum. In addition, the market is characterized by expanding output and declining prices – key indicators of a competitive market structure. Finally, consumers and content and applications providers are acutely aware of offerings in the access market and are vigilant about provider practices.

The buildout of broadband networks, which is continuing apace, has been fueled by growing consumer demand. The Internet is a major part of everyday life in America and is

critical to our nation's economy. It is estimated that 73% of U.S. households are connected to the Internet.¹³ Its popularity is unmistakable. People use it to communicate with each other, to entertain and be entertained, to inform and to be informed, and to buy and sell goods. It therefore should be no surprise that many companies are making massive investments in a race to build or enhance existing networks in attempting to be the provider that can offer consumers with the most satisfying Internet experience.¹⁴

The investment in fast Internet access networks is enormous. For example, the cable industry reportedly invested over \$100 billion in plant upgrades since 1996.¹⁵ AT&T and Verizon have each announced multi-billion dollar investments in fiber-based network upgrades to increase bandwidth in order to provide video and faster Internet services. Billions of dollars in investment are being made by wireless companies, including \$3B by Sprint Nextel, to greatly increase wireless bandwidth capabilities. The FCC's Advanced Wireless Service (AWS) auction in 2006 resulted in spectrum investments of close to \$14 Billion for the right to provide wireless broadband services.

This investment is increasing the number and speed of "on ramps" to the Internet. Internet access is no longer relegated to the family den or the office cubicle. Today, Internet access is available on the back patio, at the library, in the classroom, at the airport, in the coffee shop, in the hotel room, in the dorm room, throughout the campus, and throughout the office building. Investment in wireless technology is making anytime, anywhere access a reality.

The bandwidth investment race is also dramatically increasing access speeds. In March, 2000, the FCC began collecting data on broadband. It defined "high speed" broadband services as those that provided the subscriber with transmission at a speed in excess of 200Kbps in at least one direction,¹⁶ which reflected the prevailing high-speed service available at that time. Today, the telephone companies' fastest selling DSL products are those with speeds exceeding 1.5Mbps and typical cable modem speeds approximate 4.5Mbps. The emerging telephone company fiber-based access reaches 30Mbps and it is believed that cable hybrid-fiber coax upgrades may lead to speeds as much as 200Mbps.¹⁷ The wireless broadband technology

¹³ Berenstein Research, *US Cable and Telecom: Is Today's DSL Tomorrow's dial-up?*, December 4, 2006.

¹⁴ It is this investment that is adversely impacted by the monopoly status of the special access market. Competitors are forced to pay inflated special access rates to the ILECs rather than investing those dollars in additional network buildout. Thus, while carriers such as Sprint Nextel will certainly continue to expand and improve their broadband networks, they will do so at a premium – a premium they are forced to pay to their direct broadband competitors.

¹⁵ See "Cable Industry Infrastructure Expenditures" at <http://www.ncta.com/ContentView.aspx?contentId=56>.

¹⁶ *High-Speed Services for Internet Access: Status as of June 30, 2000* (October 2000) available at <http://www.fcc.gov/wcb/iatd/comp.html>.

¹⁷ Berenstein Research, *US Cable and Telecom: Is Today's DSL Tomorrow's dial-up?*, December 4, 2006.

currently deployed by CDMA providers permits speeds as high as 1.4Mbps and Sprint Nextel's investment in wireless WiMax will provide access of up to 4Mbps.

There are two primary drivers of all this market activity: customer demand and competition. Consumers and businesses want the content and capabilities of the Internet; they want it fast and they want it everywhere. The demand is nearly insatiable and providers are racing to meet it. People were enamored with telephone company dial-up Internet access until they got a taste of cable modem. This, in turn, forced the telephone companies to roll-out DSL and now the wireline bandwidth race is on. Meanwhile, wireless companies invested in rolling out relatively low-speed Internet access on cell-phones allowing fairly simple capabilities like checking stock quotes, or the weather, or email. Now, consumers and businesses are demanding the same capabilities they get at home or in the office but do not want to be tethered. Wireless companies are fully engaged in the bandwidth race, already blanketing the majority of the U.S. population with mobile broadband service. While much less prevalent, power companies and satellite service providers have entered the race as well. Demand for more, better, faster and anywhere Internet connectivity is the impetus; technology advancements are the vehicles; and, competition is the fuel driving the investment as providers vie to constantly improve the Internet experience.

The result of all this competitive market activity is that providers of compelling content and applications are finding an ever-growing number of increasingly fast avenues for people to access and use their content and applications. Competing broadband network providers know that they must provide a highly satisfying customer Internet experience or they will not attract customers to their "on-ramp". The winners are: (1) businesses that are finding more ways to advertise and sell their goods and services on the Internet to consumers; (2) the content and applications providers that have an increasing number of improved platforms for use of their content and applications; and (3) consumers who enjoy high-value, high-quality, affordable choices for Internet access.

In this environment – and without the identification of specific problems – calls for government intervention in the provision of Internet access are sorely misplaced. The call for nebulous "Net Neutrality" concepts, which are more appropriately labeled "Net Regulation," are an unnecessary and costly diversion from the competitive energy that is driving the Internet, a diversion that is harmful for consumers and competition.¹⁸ Specifically, government

¹⁸ The Internet and the provision of broadband access are characterized by rapidly evolving technologies and business models, as well as service and product differentiation. For instance, Google greatly altered the landscape by successfully demonstrating that advertising can be a key driver supporting the provision of search services, and companies like Akamai and Limelight have built businesses around the provision of local caching, which enables increased and more efficient access to video services. The wealth of different service and product offerings

intervention could very likely preclude the continued development of creative business models that leverage the unique and innovative capabilities of the various broadband network operators, equipment manufacturers, and content and application providers. Indeed, had the government intervened in the Internet search market by imposing similar “non-discrimination” principles,¹⁹ the large search engine providers would have been prohibited from pursuing the highly successful business model of providing search-specific commercial advertisements. Under this business model, Internet searches are paid for by businesses that want to match their goods or services to consumers based on the keywords that the consumer types into the search engine. Such targeted marketing is a highly valuable tool for these businesses and search engine providers have tapped into that value by partnering with businesses through unregulated, commercial relationships. Consumers have benefited from this business model through the availability of free searches and the myriad related innovations in the Internet search market.

Similarly, broadband network operators are developing relationships with device and equipment manufacturers as well as content and application providers to provide unique, customized services to meet the specific demands of individual consumers. Such market-driven relationships between network operators and content and application providers, and electronic equipment suppliers should be encouraged rather than limited or restricted by government-imposed “non-discrimination” concepts.

Consumers and businesses are benefiting from a growing number of increasingly high-speed avenues to the Internet. By the same token, Internet content and applications providers are benefiting from a growing number of increasingly fast avenues over which they can disseminate their content and applications. It is at best unclear if anyone – other than lawyers, policy pundits, and college professors – benefits from the debate over the imposition of government intervention into the Internet through “Net Neutrality” regulation.

The irony of this debate is the fervor with which proponents decry what they describe as either a “*duopoly*” or an “*oligopoly*” in the provision of Internet broadband access services, while another segment of the telecommunications industry that has a direct impact on the state of broadband competition – the special access market – is a virtual *monopoly*. In reality, Internet access is highly competitive, filled with access alternatives from multiple intermodal

accessed over local facilities and the Internet have arisen at the very same time that the Net Neutrality proponents have alleged access providers will limit opportunities.

¹⁹ It should be noted that the Net Neutrality proponents are not seeking the type of non-discrimination requirement found in Section 202 of the Communications Act of 1934, which only prohibits unreasonable discrimination and permits carriers to offer different types of services with different prices and levels of quality so long as these offerings are made available to anyone. *See* 47 U.S.C. §202. Rather, the proponents want a “one-size fits all” approach, where providers cannot offer and charge for different types of service. Such a radical proposal is especially harmful to network development and deployment, and, perhaps most importantly, to consumers, as providers will be forced to recover costs from them rather than from other users of their networks.

technologies, multiple platforms, and multiple broadband network providers. Unfortunately, as discussed above, the same cannot be said for the wholesale special access market.²⁰

The provision of Internet broadband access is a market success, not a market failure. Rather than intervene in a market that is already competitive with numerous alternative providers, policymakers should concentrate on addressing the failure in the underlying wholesale special access market where ILECs are exploiting their dominance through excessive fees imposed on their competitors who must rely on those monopolized services to build out their broadband networks. Addressing the special access market failure by returning pricing discipline to the ILECs' special access services will unleash even greater competitive energy into broadband deployment, level the playing field between incumbent and competitive providers – by ensuring that competitors are not forced to fund not only their own buildout but also the incumbents' buildout – and result in an even more vibrant, competitive broadband Internet access market that will benefit consumers and serve the public interest.

Thank you for your attention to this critical broadband deployment issue.

Sincerely,

/s/

Robert S. Foosaner
Sr. Vice President, Government Affairs

²⁰ When a retail competitor, *e.g.*, an ILEC, also controls an essential input needed by all other competitors, one of two results is likely: (1) the ILEC can price its own retail service at economic cost (*i.e.*, the actual cost to it of providing the service, including the essential input sold to others at a monopoly price), thus reducing the ability of competitors to compete; or (b) the ILEC can keep the price of the retail service at a rate level reflecting the monopoly price of the essential input, thus artificially inflating the price to consumers.