

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
Special Access Rates for Price Cap Local)	WC Docket No. 05-25
Exchange Carriers)	
)	
AT&T Corp. Petition for Rulemaking to Reform)	RM No. 10593
Regulation of Incumbent Local Exchange Carrier)	
Rates for Interstate Special Access Services)	
_____)	

COMMENTS

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COMMENTS OF BT AMERICAS INC.

BT Americas Inc., a wholly owned indirect subsidiary of BT Group plc (“BT plc”), submits these Comments on behalf of itself and other BT operating entities in the US (collectively referred to herein as “BT”) pursuant to the Commission’s NPRM published in the Federal Register on July 25, 2007.¹ BT holds section 214 licenses and employs approximately 4000 people in the United States. BT serves the global information and communications technology needs of large business (“enterprise”) customers worldwide and is also a major purchaser of special access in the United States and elsewhere.

INTRODUCTION AND SUMMARY

BT welcomes this opportunity to refresh the Special Access record. Special access is today an essential input for U.S. businesses for both day-to-day and mission critical telecommunications services.

¹ 72 Fed. Reg. 40814-40816 (July 25, 2007).

Market failure is demonstrated by the recent GAO study on special access² that found that there are virtually no competitive alternatives to the BOCs special access in low density areas or for DS-1 or DS-3 service. The GAO also found that phase II pricing for special access is higher, not lower, than price-cap special access services, even when the discount plans are taken into account. Substantial independent data corroborates the GAO's findings. This includes: (i) the data submitted in various FCC special access and merger proceedings between 2002 and 2005 which provide annual snapshots of persistent, indeed deteriorating, market failure, (ii) international benchmarks that show much lower priced special access and broadband facilities, and more widely available innovative access services, in countries that have adopted *proportional* regulation to promote true market driven competition, investment and innovation; and (iii) the experiences of special access customers, who have not seen the emergence of the viable competitive alternatives claimed by the BOCs.

Market failure is due to the reliance on improper competitive triggers in a market characterized by high barriers to entry and little real, rather than claimed, intra- or inter-modal competition; the recent spate of mergers between BOCs and their largest CLEC competitors, and between two BOCs, with only minimal special access conditions; and the prevalence of long term "lock in" contracts and the use of terms and conditions that preclude competitors from achieving minimum economies of scale. The result of BOC dominance of the special access market is overpriced access services that divert funds

² U.S. Government Accountability Office, Report to Chairman, House Committee on Government Reform, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO 07-80 (November 2006). <http://www.gao.gov/new.items/d0780.pdf> ("GAO Report on Special Access").

that could be used more productively by U.S. businesses³ and less innovation as the BOCs refuse to sell at competitive prices the special access components needed for more innovative access services such as Ethernet.⁴

The appropriate regulatory remedy is a proportional one. Regulation is not an either/or proposition as suggested by the BOCs. There are more narrowly tailored, market sensitive, regulatory remedies. The Commission could reset special access rates in the near term to cost and otherwise require terms that allow customers to switch some of their volume to competitive providers where those competitors are present, allowing competitive providers to achieve the minimum scale necessary to compete in the long term. There is also the U.K. model of functional separation that retains vertical efficiencies, maintains incentives to invest in market driven innovation, and still allows special access prices to go down to cost.⁵ Yet a third potential remedy is that proposed in the AT&T/BellSouth merger⁶ and that has been used in at least one other proceeding⁷ --

³ “Taken together, the total cost of over-pricing high capacity loops results in an annual economic loss to American business of nearly \$13 billion. The overall impact on the economy is larger because higher infrastructure costs for business enterprises translate into fewer jobs, slower economic growth, and higher retail prices for finished goods and services.” Microeconomic Consulting & Research Associates, Inc. “The Economic Impact of the Elimination of DS-1 Loops and Transport as Unbundled Network Elements” (June 29, 2004).

⁴ The mergers, and premature deregulation, have also led to the creation of a government-sanctioned national trade barrier for foreign entrants seeking to compete in the U.S. See, e.g., *In re Application of SBC Commc’ns Inc. & AT&T Corp.*, Memorandum Opinion and Order, WC Dkt. No. WC Dkt. No. 05-65, FCC 05-183 (Nov. 17, 2005) (“*SBC/AT&T Merger Order*”) at ¶187 (the FCC found the merger was in the public interest, in part because “[w]e find that the merger will create a stable, reliable, U.S.-owned company that will provide improved service to government customers” emphasis added). This potentially violates the World Trade Organization, *Reference Paper: Negotiating Group on Basic Telecommunications*, (Apr. 24, 1996), available at: http://www.wto.org/english/news_e/pres97_e/refpap-e.htm section 1.1 of the WTO Reference Paper (which states that “appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices”).

⁵ The Commission’s stated goal is “to drive interstate access charges toward the costs of providing those services.” *In the Matter of Unbundled Access to Network Elements Order on Remand*, WC Dkt. No. 04-313, CC Dkt. No. 01-338, 2005 WL 289015, (“*TRO Remand Order*”) ¶ 61.

⁶ Comments of the Special Access Coalition, *In the Matter of Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission’s Rules for Consent to the Transfer of*

“baseball arbitration,” whereby an arbitrator would decide between the last, best offers of the party purchasing and the party that is supplying the bottleneck services.⁸

Proportional regulation that encourages cost-based access to bottleneck facilities ultimately promotes, not stifles, (i) the emergence of viable, long term, competitive markets, (ii) the investment in market-driven (rather than incumbent dictated) innovation, both in terms of the type and pace of innovation, and (iii) total consumer welfare.

ARGUMENT

I. THERE IS OVERWHELMING EVIDENCE OF MARKET FAILURE IN THE SPECIAL ACCESS MARKET

A. The Relevant Market in Which to Evaluate Market Failure is the Multi-Site Special Access Market

Both the Commission⁹ and the Department of Justice¹⁰ determined in the recent SBC/AT&T and Verizon/MCI proceedings that special access is a discrete market. Indeed, the DOJ complaints identified a second discrete market dependent on the special access market, that of “other telecommunications services that rely on Local Private

Control of BellSouth Corporation to AT&T, Inc., FCC Dkt. No. 06-74 (“AT&T/BLS Merger Proceeding”) (Oct. 24, 2006).

⁷ *E.g., General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd. Transferee for Authority to Transfer Control*, 19 FCC Rcd 473 (2004).

⁸ This form of arbitration would be used on broader contract-by-contract, not on a circuit-by-circuit, basis. To be effective, such a remedy must be simple and fast, to conform to the needs of special access purchasers.

⁹ *SBC/AT&T Merger Order*, 20 F.C.C.R. 18,290 (2005) ¶ 24 (defined by the FCC as dedicated transmission link between two places), FCC, Mem. Op. & Order, *In re Verizon Commc’ns Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, 20 F.C.C.R. 18,433 (2005) (same).

¹⁰ Compl., *United States v. SBC Commc’ns*, Case No. 1:05CV02102 (EGS), ¶ 1 (D.D.C. filed Oct. 27, 2005) (“SBC/AT&T Complaint”), available at <http://www.usdoj.gov/atr/cases/f212400/212421.htm>; Compl., *United States v. Verizon Commc’ns* Case No. 1:05CV02102 (EGS), ¶ 1 (D.D.C. filed Oct. 27, 2005), available at <http://www.usdoj.gov/atr/cases/f212400/212428.htm>.

Lines,” reflecting the reality that special access is a critical input to many telecommunications services.¹¹

Purchasers of special access services are primarily other carriers and multi-site enterprise business customers who need “universal connectivity” to all their sites, including not only sites in Central Business Districts, but more often, due to lower labor and land costs as well as for tax reasons, in suburban, exurban and even rural areas. A supplier must be able to provide connectivity at the right speeds and at the right level of security and reliability to *all* of the large enterprise customer’s sites if the supplier is to successfully compete for its business.

On the supply side, the special access market consists of full-line suppliers and narrow-line suppliers. The only “full-line” suppliers are the BOCs within their own region, able to respond to the in-region portion of customer bids, in both metropolitan and non-metropolitan areas, with special access facilities provided from a single supplier, itself. “Narrow-line” suppliers encompass all the other retail special access providers who must purchase at wholesale the vast majority, or all, of their special access needs. The barriers to entry for becoming a full-line supplier are quite large as there are significant transaction costs and the requirements to negotiate with hundreds of suppliers. There are also technical limitations to the ability to compete as engineering and Service Level Agreements (“SLAs”) may not be able to be met when several networks need to be “meshed together” to meet the customers needs.¹² Finally, the requirements for franchise

¹¹ *Id.*

¹² As noted by AT&T and BellSouth in their merger petition, “[w]hen traffic has to flow between networks, it is difficult, if not impossible to offer strict QoS provisions in SLAs, because the carrier offering the SLA must build in to its QoS calculations the latency and packet loss that stem from peering, hand-offs, and the utilization of a third-party network.” *AT&T and BellSouth, Description of Transaction, Public Interest Showing and Related Demonstration*, FCC Dkt. No. 06-74, (March 31, 2006) (“AT&T/BLS

and right-of-way agreements from local municipalities add costs that the BOCs, who were given access to a public right-of-way, do not incur.¹³

1. There is No Meaningful Intra-Modal Competition for Special Access Services from CLECs or Other BOCs

There is no meaningful intra-modal competition for the provisioning of special access services from Competitive Local Exchange Carriers (“CLECs”) including the other BOCs.

Even national CLECs do not have the requisite “fiber rich, POP rich” network that the BOCs were able to construct at ratepayer expense, nor do they have the requisite footprint outside the Central Business Districts to meet the multi-site demand of special access customers.¹⁴ And recent financial results show such national CLECs faltering¹⁵ even as profits for the BOCs are soaring.¹⁶

Merger Public Interest Statement”) Smith Decl. ¶ 46, also noting “the shortcomings of interprovider network agreements.” *Id.*, ¶ 48.

¹³ See Dr. Nicholas Economides, in the SBC/AT&T and Verizon/MCI Tunney Act proceedings, analyzed the various aspects of the special access markets and its participants including the geographic market definition, Declaration of Nicholas Economides appended to Mem. of Eliot Spitzer, Atty. Gen. of the State of New York, in Resp. to the Aug. 7, 2006 Submission of the United States, *United States v. SBC Commc’ns*, Case No. 1:05CV02102 (EGS) (D.D.C. filed Sept. 5, 2006) (“Economides Tunney Act Declaration”) ¶¶19-54. Thus Dr. Economides concludes that based on the data in his Declaration “the retail market for local private lines has to be at least as large as the number of buildings that customers demand be connected to form private line networks,” *id.*, ¶ 26, and that the wholesale market is likely to be the MSA “or larger where customers demand private networks linking buildings in multiple MSAs,” *id.*, ¶ 31. See also Statement of Joseph Farrell, Attachment A to Comments of Global Crossing North America, *SBC/AT&T Merger Proceeding*, WC Dkt. No. 05-65 (April 25, 2005) (“Farrell Statement”) at ¶17. These declarations are incorporated herein by reference.

¹⁴ See e.g. XO Communications Reply Comments in the *Special Access Proceeding, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (“*Special Access Proceeding*”) at 4-5 (July 29, 2005) (also describing the BOCs price and non-price discriminatory conduct).

¹⁵ Thus Level 3 reported that for the 2nd Quarter, 2007 revenue from core communications services fell 2 percent to \$888 million and its forecast for third-quarter EBITDA (earnings before income, taxation, depreciation and amortization), at \$210 million to \$230 million, was below the average analysts’ forecast of \$239 million. *Level 3 results disappoint and shares slump*, Reuters News, Thursday July 26th, 2007.

¹⁶ E.g., AT&T Inc. posted a 61 percent increase in second-quarter 2007 earnings (July 25, 2007) <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/24/AR2007072400508.html>; Qwest Communications International Inc. posted second-quarter earnings for 2007 that more than doubled from

Nor are the BOCs actual or potential competitors in each others' regions.¹⁷ For example, in the AT&T/BellSouth merger, AT&T asserted that "AT&T has local fiber networks in only 11 metropolitan areas in BellSouth's territory and local fiber connections to fewer than 330 total buildings in those MSAs, more than 100 of which house BellSouth wire centers, an IXC POP, or AT&T local nodes or signal regeneration facilities."¹⁸ In other words AT&T which (i) at that time of its merger with BellSouth was comprised of both SBC, the *dominant* ILEC special access provider in the adjacent region (the largest in the U.S. by any measure), and AT&T, previously the *largest* national CLEC facilities-based special access competitor, and (ii) had, as part of its core business strategy since 1998, "an aggressive plan" to install 2,900 miles of fiber out-of-region, with 75-125 miles of fiber in an initial 30 out-of-region markets (including many in BellSouth's region), to provide local, including special access¹⁹ was, eight years later, by its own admission, an irrelevant competitive factor for special access outside its own region.

the same period last year. (Aug. 1, 2007)

<http://www.forbes.com/markets/feeds/afx/2007/08/01/afx3976371.html>

¹⁷ Chicago Tribune, 'Ameritech Customers Off-Limits' (October 31, 2002) (Quoting Qwest's Chairman Richard Notebaert that while competing with other BOCs for customers "might be a good way [for Qwest] to turn a quick dollar" that "doesn't make it right"). See, also AT&T/BLS Merger Public Interest Statement at 56 (noting AT&T's minimal presence in the wholesale out-of-region wholesale special access market).

¹⁸ AT&T/BLS Merger Public Interest Statement, Dkt. No. 06-74 (March 31, 2006) at 55, supported by the Carlton/Sider Declarations.

¹⁹ Application of SBC Communs. & Ameritech Corp. for Transfer of Control to SBC Communications, CC No. 98-141 (July 24, 1998) at 17 and accompanying affidavit of its Senior Vice President for Corporate Development, James S. Kahan, ¶¶ 37-39, 57-59 ("our fiber will be available to provide local exchange service in the 30 MSA which SBC contemplates entering to offer local exchange service ... and other telecommunications services to businesses ... in the 30 largest U.S. local markets outside its incumbent service area") and Attachment A identifying numerous markets in BellSouth's territory including 4 of the 11 cities identified by AT&T in its AT&T/BLS Public interest statement: Atlanta, Miami-Ft. Lauderdale, Birmingham and Nashville-Davidson. The other BellSouth MSAs listed Attachment A included Tampa-St. Petersburg, Norfolk-Virginia Beach, Greensboro-Winston-Salem, Louisville and Memphis.

Thus it is apparent that robust intra-modal competition for special access, either by the BOCs and/or their financially weaker CLEC competitors, is minimal and unlikely to emerge.

2. There Is No Meaningful Inter-Modal Competition for Special Access

There are no meaningful inter-modal competitive alternatives. The ultimate purchasers of special access services need a degree of ubiquity, reliability and security that is simply not available with these other alternatives.

As BT demonstrated in the *Twelfth Annual CMRS Report*²⁰ and *Skype*²¹ proceedings, the wireless market is dominated by the BOCs' affiliates, engaging in parallel conduct that would not be evident if there were any competitive entry. Nor does wireless currently provide the level of reliability and security demanded by current purchasers of special access services. WiFi and WiMax don't have the bandwidth, service quality or reliability required for services currently being provisioned over special access.²² Broadband over Power Line is more myth than reality at this point.²³ Nor are cable or Voice over Internet Protocol ("VoIP") viable competitive alternatives.

²⁰ Reply Comments of BT Americas Inc. on Behalf of Itself and other BT Entities, *Implementation of Section 6002(b) Of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Dkt. No. 07-71 (May 22, 2007)

²¹ Reply Comments of BT Americas Inc. on Behalf of Itself and other BT Entities, *In the Matter of Skype Communications, S.A.R.L. Petition to Confirm a Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks*, RM No. 11361 (May 15, 2007).

²² WiMax services (using non-certified CPE) offer consumers between 512 Kbps and 1,536 Kbps — a far cry from the WiMAX Forum's 70 Mbps boast — Forrester Research, *Let's Get Real About WiMax*, July 2005. WiFi is a more highly contended and less secure service. It has been urged that WiFi is a viable competitive alternative based on a 2006 experiment by Google for residential users in the town where it is headquartered. Sarah Jane Tribble, *Going Wireless in Mountain View, Google Launches Free WiFi Today*, San Jose Mercury News, Aug. 16, 2006, at 4 ("The network covers about 90 percent of the city's 12 square miles and offers maximum data-transfer speeds of up to 1 [Mbps] -- slightly slower than DSL. . . . The Mountain View-based company spent in the 'ballpark' of \$1 million on the project And the company agreed to pay Mountain View \$36 per light pole, or about \$13,680, annually, although that number may

Cable companies lack the geographically broad “fiber rich, POP rich” network demanded by wholesale special access purchasers or the track record of reliability that special access purchasers demand. The cable industry is far more fragmented geographically than the telecom industry, and its core competency has been residential video offerings.²⁴ BOC advertising has re-enforced the perceptions that even small businesses entrusting their voice telephony services to the cable companies will result in their losing business and going bankrupt.²⁵

grow slightly as the company plans to install a few more transceivers as residents request more access.”). This effort has not been replicated in other venues where Google would not have comparable “home town” advantages.

²³ In 2004 then FCC Chairman Powell said that the potential for BPL was bright. *Powell Says Interference Addressed in New Broadband Over Power Line Rule*, Pike and Fischer News & Analysis, Oct. 2004. Three years later, Chairman Martin testified before the Senate Energy and Commerce Committee that BPL is a potentially significant player in the broadband market despite its dismal market penetration. Written Statement of the Hon. Kevin J. Martin, Chairman, FCC, before the Committee on Science, Commerce and Transportation, U.S. Senate, Feb 1, 2007.

²⁴ A recent study concluded that the MSOs “are too preoccupied with rolling out consumer VOIP and defending their customer bases against telco IPTV” to focus on the enterprise segment. That report further noted, the MSOs “would also need to pump up their bandwidth offerings substantially to win enterprise business away from the telcos ... ‘the dirty little secret of the cable industry is that there is far too little bandwidth,’ the report says. ‘The available spectrum in the cable MSO network (up to 860 MHz) is being used to deliver their bread-and-butter broadcast video services.’” Heavy Reading (Sterling Perrin), *Cable vs. Telcos: The Battle for the Enterprise Market* (“Cox Communications Inc. ... regarded as the most aggressive MSO in the space yet makes only 6 percent of its revenue there” and that includes all business customers, including small and medium businesses). http://www.lightreading.com/document.asp?doc_id=89210. See, http://goliath.ecnext.com/coms2/gi_0199-5228147/Cable-Operators-May-Miss-a.html (Feb. 15, 2006) (the enterprise market is likely to remain largely ignored by cable in the near term, as operators continue to focus on shoring up their residential services in their escalating battles with incumbent telcos, according to a major new report from Heavy Reading, Light Reading Inc.'s market research division). The Executive Summary and Table of Contents of this Report can be found at <http://translate.google.com/translate?hl=en&sl=ja&u=http://www.dri.co.jp/auto/report/hr/hrcvst06.htm&sa=X&oi=translate&resnum=7&ct=result&prev=/search%3Fq%3DHeavy%2BReading%2B%252B%2B%2B%25E2%2580%259CCable%2Bvs.%2BTelcos:%2BThe%2BBattle%2Bfor%2Bthe%2BEnterprise%2BMarket%25E2%2580%259D%2B%26hl%3Den%26rls%3DSUNA,SUNA:2006-29,SUNA:en> (Feb. 17, 2006).

²⁵ See, e.g., http://www.operationgadget.com/2006/05/verizon_running_ads_against_op.html “Verizon Running Ads Against Optimum Voice in New York City Radio Market” (“Over the past few days Verizon has been running ads on powerful New York Radio stations ... suggesting that small businesses shouldn't switch to Optimum Voice, the VoIP service from Cablevision. The ads suggest that Optimum Voice is unreliable, causing small businesses that switch their phone service to them to lose business and ultimately fail”).

VoIP is not an access technology; VoIP is still dependent on either fiber or cable into the home or business. Moreover, it is far from clear whether VoIP can be considered as an “independent” competing technology in light of the recent judicial developments in *Verizon Services Corp. v. Vonage Holdings Corp.*, where a jury found that Vonage infringed three Verizon patents relating to VoIP subjecting Vonage (and potentially other non-Verizon VoIP providers) not only to monetary but injunctive relief as well that would preclude it from acting as a competitor.²⁶

Thus in the SBC/AT&T and Verizon/MCI mergers, the “hard data” collected by the Department of Justice “by using compulsory process” showed that the BOCs overwhelmingly dominated the “last mile connection” for special access²⁷ and that the vast majority of buildings in a given metropolitan area were not served by a cable or any other provider.

3. Intra- and Inter- Modal Competition are Unlikely to Emerge Because of the Prevalence of the BOCs’ “Lock-in” Special Access Arrangements

The BOCs have adopted special access agreements with major purchasers that effectively deny competitors sufficient usage to achieve minimum scale. One such plan, BellSouth’s Transport Savings Plan tariff (“TSP”), was described in a pleading filed on behalf of the Commission as follows:

“The TSP is an ‘overlay’ plan in which BellSouth provides volume discounts to certain customers. The discounts vary according to two factors: The first factor is the customer’s volume. The customers are grouped into six revenue bands, with increasing discounts for each band. The second factor is the customer’s year in

²⁶ See, <http://news.moneycentral.msn.com/provider/providerarticle.aspx?feed=OBR&Date=20070308&ID=6589920>; see also, Slip Copy, 2007 WL 528749 (E.D. Va., Feb. 12, 2007) (setting forth the patent claims).

²⁷ Plaintiff United States’ Response to Public Comments at 18, n. 28.

the plan: The discounts increase annually within each band from year one to year five ... To be eligible for the TSP, a customer must commit to buy special access from BellSouth for five years in annual amounts equal to at least 90 percent of its annualized purchases from BellSouth in the six months immediately preceding its subscription to the plan. This is called the customer's 'committed volume level.' A customer may choose to increase its committed volume level to reach a higher volume band – thus earning a greater discount – but it may not lower its annual volume commitment. If a customer does not meet its committed volume level in a particular year, it must pay shortfall charges. And if a customer leaves the TSP before the plan's scheduled end, it must pay termination charges. At the end of the five-year term, a customer may invoke the so called 'evergreen' provision and extend its TSP plan in one-year increments indefinitely, so long as the customer continues to buy special access service from BellSouth at its committed volume level or higher."²⁸

The other BOCs have adopted similar plans.²⁹ And the AT&T/BellSouth merger has now aligned the AT&T and BellSouth plans into a common plan over a larger footprint, expanding the minimum scale needed by competitors to enter.

"Narrow-line" suppliers must subscribe to these plans in order to obtain the BOCs discount for special access in those areas (non-Central Business District) and for those capacities (such as DS1) where the BOCs have significant market power because it is uneconomic for any rational competitor to provision competing facilities or for any rational purchaser to self-supply.

²⁸ The Commission's redacted brief in *BellSouth Telecommunications v. FCC*, D.C. Circuit Court of Appeals Dkt. No. 05-1032 (June 1, 2006) at 8-9.

²⁹ Comments of CompTel/ALTS, Global Crossing North America, Inc., and NuVox Communications WC Dkt. No. *Special Access Proceeding*, WC Dkt. No. 05-25 (June 13, 2005) (analysis of the anticompetitive effects of all the BOC discount plans). See also, *Ex parte* letter from A. Richard Metzger, Jr, Lawler, Metzger & Milkman, LLC on behalf of MCI to Marlene H. Dortch, Secretary, Federal Communications Commission, RM 10593 (June 30, 2004); *Ex parte* letter from Patrick H. Merrick, Esq., Director – Regulatory Affairs, AT&T Federal Government Affairs, to Marlene H. Dortch, Secretary, Federal Communications Commission, RM Docket No. 10593 (November 9, 2004); Comments of AT&T Corp., *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Dkt. No. 04-313, CC Dkt. No. 01-338 (Oct. 4, 2004) ("AT&T's TRO Remand Comments") at 149-153.

B. The GAO Report Demonstrates Market Failure And Has Been Independently Validated

1. The GAO Report Demonstrates Market Failure

The recent GAO's Report on special access³⁰ confirms what purchasers of special access market have been demonstrating since the initiation of these special access proceedings in 2002 – that reliance by the Commission on improper triggers for inferring competition has led to massive market failure in the form of inflated and excessive prices to end users, unchecked by new entry because of insurmountable barriers to entry and the strategic behavior of the BOCs.

The GAO looked at a representative sample of 16 major MSAs in what was then four BOC regions and found:

(i) *There are virtually no competitive alternatives to the BOCs special access in low density areas or for DS-1 or DS-3 service.*

The GAO found that:

- “[T]hat competitors are serving, on average, less than 6 percent of the buildings³¹ with at least DS-1 level of demand” and about 15 percent of buildings with a DS-3 level of demand.³² Indeed this data “may overstate the availability of facilities based competition” because of mergers, bankruptcies, the inclusion of entities that do not provide special access and outdated classification of equipment.³³ As to the issue of underreporting by the BOCs and/or their competitors, the GAO analysis noted that even if there was underreporting that would only increase the percentage of buildings served to 8%, and noted that

³⁰ GAO Report on Special Access, *supra* note 4, GAO 07-80 (November 2006). <http://www.gao.gov/new.items/d0780.pdf>.

³¹ The GAO Report notes that “buildings” does not necessarily mean the entire building. *Id.* at 22 (“Competitors have pointed out that while they may have a connection to a building, they are unable to connect to businesses on all floors within that building”).

³² *Id.* at 12 and 19-20.

³³ *Id.* at 21 (“[s]ome equipment that does not provide service, no longer provides service, or no longer exists may remain in the database, falsely indicating a competitive presence. Several companies and government agencies, such as mobile telephone companies and GSA, are included in the number of competitors, even though they do not provide dedicated access connectivity for business.” Furthermore, these numbers include bankrupt companies whose equipment is still listed in the database” and may no longer be in use).

GeoResults disagreed that CLEC the underreporting was as extensive as claimed by at least one price-cap incumbent.³⁴

- *There has been a decline in some MSAs in the level of competitive colocation in the wire centers used by the price-cap incumbents to obtain pricing flexibility.*³⁵ The GAO noted that “[b]ecause Telcordia’s database is used primarily for interconnection purposes, it is likely that there is little underreporting of competitors’ presence in price-cap incumbent wire centers.”³⁶
- *There were high, if not insurmountable, barriers to entry for facilities-based competition, including “zoning restrictions, or difficulties of obtaining access to buildings from building owners, that discourage competitors from extending their networks” and that “where demand for dedicated access is relatively small, such as buildings with less than three or four DS-1s of demand, it is unlikely to be economically viable for competitors to extend their networks to the end user.”*³⁷
- *That alternative technologies such as WiMax are still being developed and have only been used in limited circumstances to replace high capacity dedicated access connections.*³⁸

And it is apparent from the GAO data that “competing” special access providers were only potential, very local competitors who might not enter at the price, or at the scale, needed by purchasers of special access. For example, Table 2 of the GAO Report³⁹ shows Norfolk, VA as the community with the third highest number of lit buildings, at 2,080 noting that this is so because there is a local cable company in the area that *has made a commitment to provide, but has not actually provided*, business services. No wholesale customer can look to interconnect with every small cable provider in a given area to take advantage of their on-net coverage.

(ii) *The BOCs’ are charging supra-competitive prices for special access:*

³⁴ *Id.*

³⁵ *Id.* at 13.

³⁶ *Id.* at 23, n. 21.

³⁷ *Id.* See also, *id.* at 19 (noting “the high cost of constructing local telecommunications networks, government regulations, and limited competitive access to buildings”) and 26-27.

³⁸ *Id.* at 18.

³⁹ *Id.* at 20.

The GAO found that:

- “[P]rices and average revenues are higher, on average, in phase II MSAs – where competition is theoretically more vigorous – than they are in phase I MSAs or in areas where prices are still constrained by the price cap.”⁴⁰
- “Since phase II pricing flexibility was first granted, list prices for dedicated access that apply under phase II, on average, have increased. Conversely, price-cap list prices available in phase I and price-cap areas were pushed downward over the same period – largely by the CALLS order. As a result, average list prices in areas with phase II flexibility are higher than average list prices in phase I and price-cap areas.”⁴¹
- As to the price discount plans, because they provided “discounts off the list price, and, therefore, since price-flex list prices are higher on average than price-cap list prices, prices will remain higher in phase II areas;” while the CALLS Order decreases in phase I areas could force prices down, “[f]or many contacts we were unable to determine their effect on net prices because certain data were unavailable. Competitors also argue that price-flex contracts require customers to meet contractual terms and conditions that my limit the availability of competing vendors to win that business ... Comparing average revenue across price-cap areas, phase I areas, and phase II areas as of 2005 – the most recent period available – we found that average revenue in the 27 phase II areas is higher, on average, than it is in the 29 phase I areas and not statistically different that [sic] average revenue in areas that are still under a price cap.”⁴²

In other words, the GAO found that the BOC deregulation did not reduce price to cost as was anticipated.

(iii) *The “competitive triggers” established by the FCC in the Pricing Flexibility Order*⁴³ *materially overstate the level of competition at the building level:*

The GAO concluded that the FCC’s competitive triggers, which focused on competition at the wire center level, was not an accurate predictor of competition at the more relevant building level.⁴⁴

⁴⁰ *Id.* at 13.

⁴¹ *Id.*

⁴² *Id.* at 14.

⁴³ *Access Charge Reform, Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order*), *aff’d WorldCom v. FCC*, 238 F3d 449 (DC Cir 2001).

⁴⁴ *GAO Report on Special Access* at 19.

2. Five Years of Data Submitted in Various FCC Proceedings Both Validate the GAO Report and Demonstrate that this Market Failure is Not Only Enduring But Worsening

The data collected over the past half-decade in this and other proceedings, demonstrate that this market failure in the special access market, has been enduring; indeed has worsened as a result of BOC consolidation and the inability of competitors to compete in the long-term as a result of the “lock-in” discount plans and other barriers to entry. The 2006 GAO findings are consistent with the data submitted over the previous five years.

Thus the data submitted in 2002 (in support of AT&T’s initial Special Access Petition),⁴⁵ 2004 (in the *TRO Remand* proceeding),⁴⁶ 2005 (in the revived *Special Access* proceeding and in the merger proceedings),⁴⁷ and 2006 (in the AT&T/BellSouth merger proceeding) show the BOCs charging inflated prices and earning increasingly excessive revenues and profits.⁴⁸ Increasingly excessive rates of return over time were identified

⁴⁵ See, Declaration of Stephen Friedlander ¶¶ 2-7 and Exhibits 1 and 2, and the Declaration of M. Joseph Stith (“*Stith Special Access Declaration*”) submitted with AT&T’s Petition in *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM No. 10593 (“*Special Access Proceeding*”) (Oct. 15, 2002); M. Joseph Stith’s Reply Declaration in that proceeding, Exhibit 1 to AT&T’s Special Access Reply Comments (Jan. 23, 2003). See also, the Declaration of Professors Willig and Ordovery, submitted with AT&T’s Special Access Petition (Oct. 15, 2002) and the Reply Declarations submitted in that proceeding by Lee Selwyn, Exhibit, 2 and Willig and Ordovery, Exhibit 3, to Reply Comments of AT&T Corp. (Jan. 23, 2003), and Declaration of Michael D. Pelcovits on behalf of WorldCom, Exhibit A to WorldCom’s Special Access Comments (Jan. 23, 2003). All of these declarations are incorporated into this proceeding by reference.

⁴⁶ Dr. Selwyn supplemented his analysis in AT&T’s TRO Remand Comments, Exhibit F, and the Reply Comments of AT&T Corp. in the *TRO Remand proceeding*, WC Dkt. No. 04-313, CC Dkt. No. 01-338 (Oct. 19, 2004) Exhibit D. These declarations are incorporated into this proceeding by reference.

⁴⁷ Reply Declaration of Lee L. Selwyn on behalf of Comptel/ALTS, *SBC/AT&T Merger Proceeding.*, WC Dkt. No. 05-65, (filed May 10, 2005) (“Selwyn Merger Declaration”). This declaration is incorporated into this proceeding by reference.

⁴⁸ A more detailed analysis of this five years of data can be found in a report prepared by Economics and Technology, Inc. on behalf of Ad Hoc Telecommunications Users Committee, *Competition in Access Markets: Reality or Illusion, A Proposal for Regulating Uncertain Markets* first prepared in 2004, Exhibit 3 to the Economides Tunney Act Declaration, and then updated in 2006, Susan M. Gately Declaration on behalf of Ad Hoc Telecom. Users Comm. FCC WC Docket No. 06-74 (AT&T/BellSouth Merger) (June 20, 2006).

using analyses based on both embedded/historical costs ARMIS data⁴⁹ (with accounting rates of return for the BOCs increasing in each succeeding analysis to in excess of 76% for three of the four largest price cap LECs)⁵⁰ and forward looking TELRIC data⁵¹ (showing similar increases over time with even more excessive rates of returns (e.g. for SBC in 2004 as high as 171% for DS1 using at “discounted” “special access rates).⁵²

3. International Benchmarks Validate the Data in the GAO Report

The GAO’s finding of excessive pricing is confirmed by a transnational cost comparison with other jurisdictions where the special access bottleneck is subject to a proportionate regulatory regime. This is certainly the case with respect to the United Kingdom where the cost of special access is materially lower than the comparable price

⁴⁹ The BOCs’ critique of ARMIS data has been fully refuted in prior proceedings, *see, e.g.* the Declaration of Susan Gately on behalf of Ad Hoc Telecommunications Users’ Committee, WC Dkt. No. 05-25 (June 13, 2005) (“Gately Decl.”) ¶¶ 13-15 (responding to the BOCs complaints about cost allocation).

⁵⁰ *Stith Special Access Declaration* (Oct. 15, 2002) (rates calculated from 2001 ARMIS 43-01, Table 1, Cost and Revenue Table, Column S, Rows 1910 and 1915 were: VZ 21.72%, VZ (excluding NYNEX), 37.08%, Qwest 46.58%, BLS 49.26% and SBC 54.6%); Letter from Brian R. Moir, counsel for eTUG and C. Douglass Jarett, counsel for API, to Marlene H. Dortch, Secretary, Federal Communications Commission, filed in the *Special Access Proceeding*, WC Dkt. No. 05-25 and WCB/Pricing Dkt. No. 05-22 (May 10, 2005); Declaration of Janet S. Fischer Declaration on Behalf of Global Crossing North America, Inc., WC Dkt. No. 05-25 (June 13, 2005), *see*, Tables 4 through 7.

⁵¹ Special access services are provided over the same facilities as, and are functionally equivalent to, high- capacity loop and transport UNEs set under the Commission’s forward-looking, economic cost methodology. *See also*, Selwyn TRO Remand Reply Declaration ¶¶ 80-86 (analysis based on revenues and costs per voice grade equivalent (VGE) found that much of the increased profits of the RBOCs was due to the widening special access price/cost gap – while average RBOC revenue per VGE was declining slightly, average RBOC operating, plant and investment costs per VGE were declining very significantly; this widening gap is the source of the RBOCs’ steadily increasing rate of return).

⁵² Compare *Stith Special Access Declaration* in 2002 with the Declaration of M. Joseph Stith submitted with AT&T’s TRO Remand Comments, Exhibit H (Oct. 4, 2004) Atts. 1, 2 ¶¶ 17-24 and Declaration of M. Joseph Stith submitted with AT&T’s TRO Remand Reply Comments, Exhibit E (Oct. 19, 2004) Atts. 1, 2. As shown therein, Mr. Stith compared the Bells’ tariffed interstate special access rates, on a state-by-state basis, with the rates for functionally equivalent cost-based UNEs. Mr. Stith conducted this analysis using both the Bells’ “month-to-month” special access rates and its discounted offerings; he also conducted his analysis with respect to the Bells’ special access rates in MSAs where they have obtained full “pricing flexibility” and in areas where they continued to be governed by price caps.

in the U.S. In the 2005 *Special Access* proceeding, BT in its Reply Comments⁵³ submitted a comparison of BT's fully incremental cost-based special access rates in the U.K. with the BOCs' prices for DS1s and DS3's, using the Purchasing Power Parities Rate analysis. Attached as Attachment A is an updated analysis, showing that this differential persists.

4. Customer Experiences Validate the Data in the GAO Report

The BOCs rely heavily on third party promotional (or aspirational) statements of third parties on their websites to substantiate their claim that there are numerous robust providers of special access. But real world experience demonstrates that this proposition is absurd. If these third parties had the type of facilities that the BOCs claim they have, one would anticipate that they would not simply let them lie fallow but would use them to respond to Requests for Proposals by large wholesale customers like BT. But even the largest CLECs often do not bid at all, or do not submit viable bids, for many of the sites in a BT RFP because they do not have their own facilities there and obtaining those facilities from a BOC would be cost-prohibitive.

Within major city Central Business Districts (CBDs) such as NY, Boston, Philadelphia, local competitors may be able to provide access at competitive DS-1 rates.⁵⁴ However, two thirds of customers' sites fall outside these CBDs, and pricing from the competitors are thousands of dollars higher than the BOCs' prices. Even more importantly, that same distance issue raises quality issues. Because of the sparseness of the competitors' networks, a non-BOC will have to make arrangements with other

⁵³ Reply Comments of BT Americas, Inc. WC Dkt. No. 05-25 (July 12, 2005), Attachment A.

⁵⁴ The overwhelming demand of enterprise customers is for DS1 circuits. Enterprise customers require DS1 circuits approximately 90% of the time; in only approximately 9% of the cases do they require DS3 circuits, and only approximately 1% of the cases do they require circuits larger than a DS3 circuit.

providers to traverse the distance. This raises a timing/delivery issue since orders are linear – a second circuit cannot be ordered until the first circuit order is completed. It also increases transaction costs and increases the number of networks that a call must traverse, making it more difficult to identify the source of a problem when one arises. And there are enormous inefficiencies in linking multiple CLEC local networks to cobble together an alternative network, particularly when serving the enterprise business market that demands 99.999% reliability backed by strict SLA requirements.

5. Efforts to Debunk the GAO Report are Specious

The BOCs and their allies have asserted that the GAO Report should not be relied upon because, as reported therein, competing providers did not provide GAO with other than anecdotal information about the prices they charged because of non-disclosure agreements in place.⁵⁵ First, the report similarly noted that the BOCs had refused to provide similar pricing information on the same grounds.⁵⁶ Second, the GAO analyzed the impact of deregulation on *BOC pricing* and *BOC margins* so it was the BOC pricing data and not competitors' pricing that was relevant. Third, and most importantly the GAO noted that any underreporting by competitors was not a significant factor in its analysis of competing *facilities* (or more accurately the lack thereof).⁵⁷ Indeed, as shown above, the GAO's conclusion that there is little to no competition is consistent with the

⁵⁵ *GAO Report on Special Access* at 11-12 and 59.

⁵⁶ *Id* at 11 (“We could not obtain specific data on the prices paid by individual customers purchasing dedicated access services at various pricing levels ... or under different contract options, or the exact amount of dedicated access purchased ... because the data provided by the price-cap incumbents are proprietary we relied on these averages to examine overall trends in markets under different phases of pricing flexibility. We were unable to independently verify the reliability of [averages they had to use]).

⁵⁷ As described in the *GAO Report on Special Access* at 8-9 and 19, n. 20 the GAO relied on data from Telecordia® Technologies, Inc. and GeoResults, which showed “the extent to which competitors have equipment in commercial office buildings that provide actual (or “lit”) service to end users of dedicated access services.”

data submitted in the prior special access and merger dockets and with the market experience of customers.⁵⁸

C. Market Failure Has Been Exacerbated by the Recent Consolidations

As predicted at the time of the SBC/AT&T and Verizon/MCI mergers, the acquisition of the acquiring BOCs' primary wholesale special access customers and competitors led to a substantial decrease in competitive alternatives. As a result, special access rates have remained at the cap set by the merger conditions,⁵⁹ rather than declined as would have been anticipated had the market been competitive. The merger conditions made the exorbitant special access prices existent at the time of the mergers the *price floor* for special access.

D. Market Failure in the Special Access Market Has Led to Anti-Competitive Conduct

The market failure demonstrated by these multiple sources of data has led to non-competitive wholesale and retail special access pricing. It also carries with it the

⁵⁸ Nor is the Commission's finding in its *Wireline Broadband Internet Access Service Order* that 61% of U.S. households have infrastructure competition, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 33 (2005), petitions for review pending, *Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. filed October 26, 2005), inconsistent with the GAO Report for at least two reasons. First, special access is primarily an enterprise business/carrier rather than a residential service. Second, as noted in BT's Reply Comments in the Commission's *Fifth Broadband Inquiry NOI*, the data used by the FCC overstates the true level of broadband competition even in the residential market because it measures the percentage of US zip codes (*i.e.*, postal codes) served with 200 kbps service (which is classified as "high speed" although it is not) in at least one direction and counts an entire postal code as served if just one subscriber to a "high speed" service exists. Reply Comments of BT Americas Inc. on Behalf of Itself and other BT Entities, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45 (May 31, 2007) (BT's Reply Comments in the Broadband NOI Proceeding) at 3-4

⁵⁹ Under the SBC/AT&T and Verizon/MCI merger conditions, it was agreed that post-merger AT&T and Verizon would continue to make available the rates offered by the pre-merger AT&T/MCI for 1.5 and 45 Mbps (DS1 and DS3) special access services in SBC and Verizon territory respectively until 2008. In the AT&T/BellSouth merger the relevant merger conditions AT&T/BLS agreed not to increase access rates and to decrease rates slightly for Ethernet and 1.5 and 45 Mbps access prices in metro areas.

substantial risk of (if not actually) raising rivals' costs and engaging in price and service quality squeezes against their wholesale purchasers who are also rivals in the enterprise business market.⁶⁰

Market failure has also affected the roll-out of innovative access services such as Ethernet. Ethernet is a protocol which is particularly efficient for the transfer of Internet Protocol (IP) packets and it is used in place of the traditional synchronous digital hierarchy (SDH) protocol. Ethernet provides higher bandwidth⁶¹ at lower prices⁶² than traditional special access. This is good for businesses, consumers and the economy at large.

Ethernet is more widely deployed in Europe than in U.S., even though enterprise customers want it wherever they do business.⁶³ In the UK, for example, BT's Ethernet products are available to virtually all enterprise sites in the country. In the U.S. however,

⁶⁰ See AT&T TRO Remand Comments at 121 regarding both the incentives and ability of the BOCs to engage in price squeezes. Nor is there sufficient countervailing buyer power to offset the BOC's enormous market power in special access. As the Department of Justice has noted "even very large buyers may be unable to thwart the exercise of market power." FTC & DOJ Commentary on the Horizontal Merger Guidelines at 17-18.

⁶¹ Ethernet services are delivered at various bandwidths from 2mbps up to 10Gbps.

⁶² Due to the simplicity of Ethernet service delivery and the cheaper equipment costs, Ethernet services can be deployed much more cost effectively than traditional SDH delivered services. Ethernet is the standard protocol in *intra*-office applications (*i.e.* the Local Area Network/LAN) and in open markets is becoming the standard protocol in *inter*-office applications (*i.e.* linking up LANs via a Wide Area Network/WAN). Standardisation and utilisation of the same protocol in the LAN and the WAN is driving efficiency gains for businesses and consumers. The electronic equipment for Ethernet is cheaper than for SDH, which should translate into cheaper prices. Furthermore, upgrading capacity usually does not require manual intervention, only a software change.

⁶³ Thus a recent analyst reported that "In Europe ... Ethernet access is more widely available [than in the U.S.] and typically lower priced ... Ethernet services ... offer less ability for carriers to work their way up the value chain alongside customers and ... requires carriers to invest in new service for which they then need to charge less, cannibalizing or preventing growth of customer bases of superior-quality services for which they charge more (e.g., private line, VPN) ... AT&T does not currently offer end-to-end international Ethernet services. It claims ongoing VPLS trials toward offering such service internationally by sometime in 2008. It ... appears — like many other carriers — to be waiting to see how much pressure the market will exert over the next couple of years in the direction of pushing Ethernet services internationally." Boyd Chastant, *International Ethernet Services: An Overview*, IDC (Apr 2007); See also, Phil Sayer, *Making Sense of European Ethernet Services*, Forrester, (May 1, 2007).

Ethernet is primarily a Central Business District (metro) offer. Wholesale Ethernet access in the UK is also cheaper than it is in the US. For example, basic 10 Mbps point to point wholesale Ethernet in the UK is available at a quarter to one half the prices charged by the AT&T or Verizon.⁶⁴

The lower penetration in the U.S. is due, as demonstrated by Time Warner Telecom's recent filings, to the BOCs refusal to provide affordable facilities needed by competitive providers to provide an Ethernet solution.⁶⁵ The BOCs have presumably refused to provide these facilities needed in order to retain the revenue and high margins of their legacy services.

II. THE APPROPRIATE REMEDY WOULD MAKE SPECIAL ACCESS AVAILABLE FROM THE BOCS AT THE PRICE AND ON TERMS THAT WOULD PREVAIL IN A COMPETITIVE MARKET

A. The Most Effective Short-Term Solution to the Special Access Bottleneck is Re-initialization of Rates and Price Caps

Until effective competition in special access emerges, BT continues to be of the view, as set forth with greater detail in its Comments in the *Special Access Proceeding*,⁶⁶ that the Commission should reset special access rates at Long Run Incremental Cost ("LRIC") and then annually readjust the rates in accordance with a price cap adjustment mechanism that follows inflation and which includes a productivity adjustment ("X-factor") and an earnings sharing component. The Commission should also proscribe

⁶⁴ See BT's Reply Comments in the Broadband NOI Proceeding at 14 and Table 2.

⁶⁵ Time Warner Telecom's ("TWTC") Petition to Deny, *In the Matter of AT&T, Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74 (June 15, 2006) (TWTC claimed that they began negotiations with AT&T over Ethernet access over a year earlier and that AT&T has, to date, refused to sell them Ethernet at reasonable rates; supported by an affidavit of TWTC's Senior VP of Marketing). See also TWTC's Comments in the Broadband NOI proceeding (May 16, 2007) at 12.

⁶⁶ Comments of BT Americas, Inc., *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (June 13, 2005) at 1-3.

unjust and unreasonable discrimination by special access providers with market power. This is not a call for re-introduction of generic tariffing rules, but necessary targeted short-term price regulation of market power to minimize the anticompetitive effects of bottleneck access providers to stifle innovation and competition.

B. An Alternative Semi-Structural Remedy that Will Allow Market Pricing so Long as the Special Access Bottleneck Persists is Functional Separation

If even this limited form of price regulation is unacceptable to the Commission, an alternative semi-structural remedy that allows much greater market price setting is functional – not complete structural – separation. Experience in the U.K. has demonstrated that this option results in access prices being driven down to cost, while retaining legitimate vertical efficiencies and the incentives to invest in market driven innovation.

Under functional separation, the incumbent, BT, established a new line of business for last mile access called Openreach which began operations on January 22, 2006. It is a multi-billion pound business, with 30,000 employees, responsible for running the U.K.'s local access network infrastructure. This remedy required the creation of an Equality of Access Board (EAB), with a majority of independent external directors appointed in consultation with Ofcom, which monitors Openreach's performance, and ensures BT complies with the various non-discrimination undertakings it has made. This includes an "equivalence of inputs" requirement which requires Openreach to provide, the same (i) products and services for BT and others; (ii) time-scales, terms and

conditions, including price; (iii) systems and processes; (iv) reliability and performance; and (v) commercial information.⁶⁷

It is in the context of this model that BT is investing in its all IP next generation network called 21CN that will deliver 24Mbps or faster broadband access by 2011. This platform is also open to competition and third party innovation which will drive the business case for further upgrades in broadband access and core. Indeed because the access separation model encourages competition, and thus investment and innovation it is being considered and to some extent implemented, in other countries as well. Thus the New Zealand Government passed a Bill calling for the functional separation of Telecom NZ into at least 3 units (access, wholesale and retail).⁶⁸ Italy is also considering the functional separation model.

C. Another Possible Alternative Remedy Would be “Baseball Arbitration” with Appropriate Price and Term Benchmarking

Yet a third option is “baseball arbitration” that was proposed in the context of the AT&T/BellSouth merger. That is, baseball-style, best and final offer arbitration procedure and a fast track arbitration procedure for alleged breaches by the merging parties of such agreements; (2) a fresh look option for affected special access customers; and (3) a procedure that will facilitate the arbitration process by making commercial special access agreements available confidentially to arbitrators (and outside counsel for parties) in order for them to benchmark the market. The process would also be technologically neutral, applying to evolving forms of special access.

⁶⁷ Subject only to: trivial differences, differences in credit vetting, payment, contract terms on termination, safe working, security, and other differences agreed by the U.K regulator, Ofcom.

⁶⁸ http://www.parliament.nz/NR/rdonlyres/1C7CD11B-DB56-479F-BD9F-2C7AE7B165F5/49639/DBHOH_BILL_7413_39794.pdf.

Price benchmarks would have to include commercial contracts not involving a BOC, evidence of rates, terms and/or conditions for comparable services in other countries such as the U.K. where competitive pricing exists, and UNE rates for comparable service elements. And there would have to be certain minimum parameters in terms of what would constitute unreasonable terms and conditions.⁶⁹

CONCLUSION

The adoption of a proportional regulatory remedy is urgent. The failure of the Commission to adopt its proposed interim⁷⁰ or final relief in 2005 has further exacerbated the special market failure in the United States. We urge the Commission to act expeditiously to avoid a further deterioration in the special access market, with its ripple

⁶⁹ For example: (i) the wholesale customer should be able to buy special access without being required to buy any additional services, like voice or data, and/or end-to-end access circuits; (ii) the BOCs may not refuse to provide access services where the customers do not have a Point of Presence (“POP”) within a particular LATA or state; (iii) there must be an absolute right, upon request, of collocation and/or interconnection at all Central Offices (“COs”) for the BOCs; (iv) the BOCs should not be able to impose restrictions on what is put over network (or example, the BOCs should not be able to limit the right of the requesting company to provide a particular technology, application, or service over its network); and (v) the BOCs should also not be allowed to impose any restrictions on the resale of the special access service purchased by the customer.

⁷⁰ Order and Notice of Proposed Rulemaking, *Special Access Proceeding*, WC Dkt. No. 05-25, 70 Fed. Reg. 19381 (April 15, 2005) ¶ 131 (a proposed interim X-factor of 5.3 percent for interstate special access).

effect on U.S. enterprise customers and their customers, and ultimately on U.S. competitiveness and productivity.

Respectfully submitted.

BT AMERICAS INC.

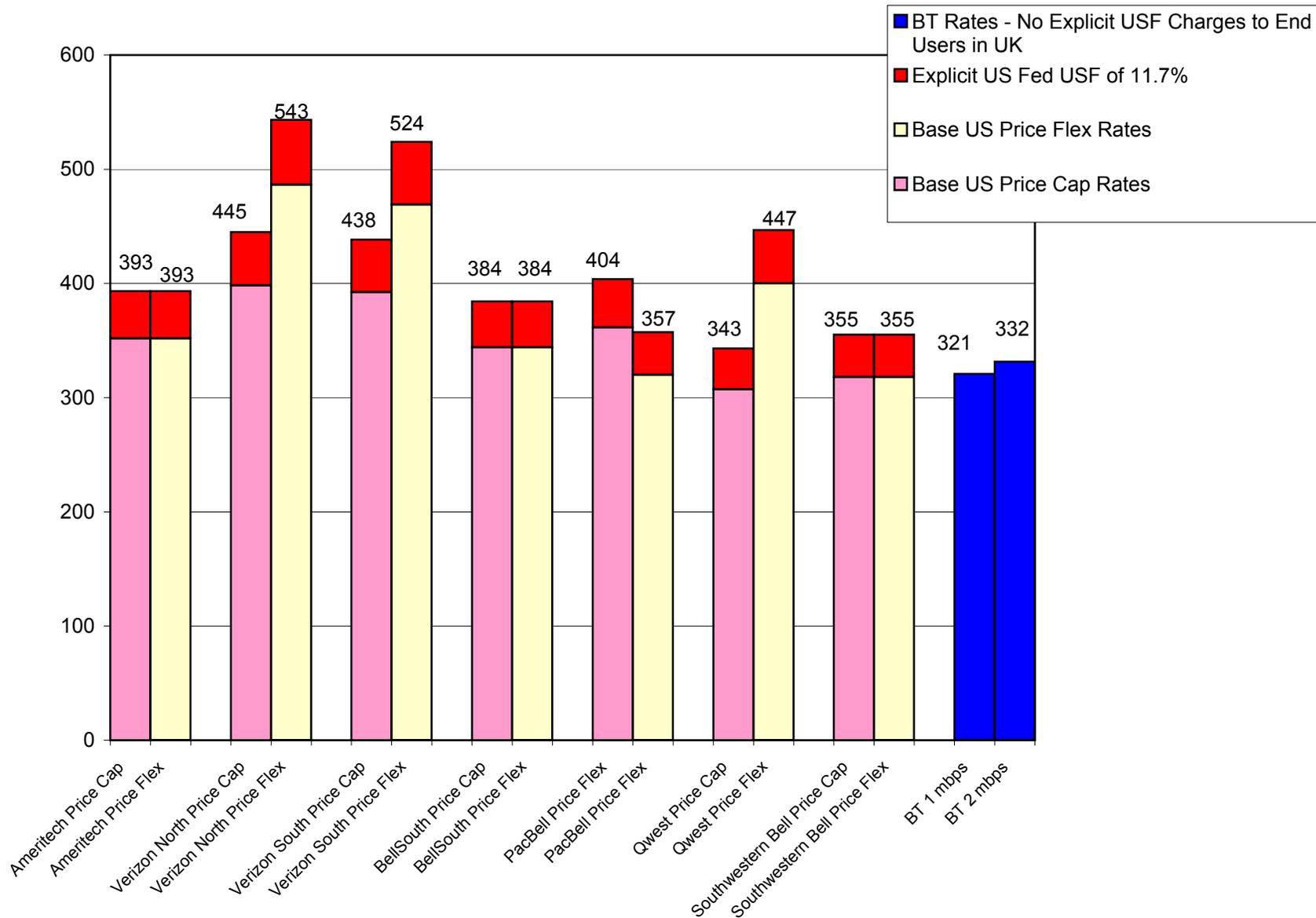
By:

A handwritten signature in cursive script that reads "Aryeh Friedman / cf". The signature is written in black ink and is positioned to the right of the word "By:".

Aryeh Friedman
Senior Regulatory Counsel
BT AMERICAS INC.
1001 Connecticut Avenue, N.W.
Suite 720
Washington, D.C. 20036

Dated: August 8, 2007

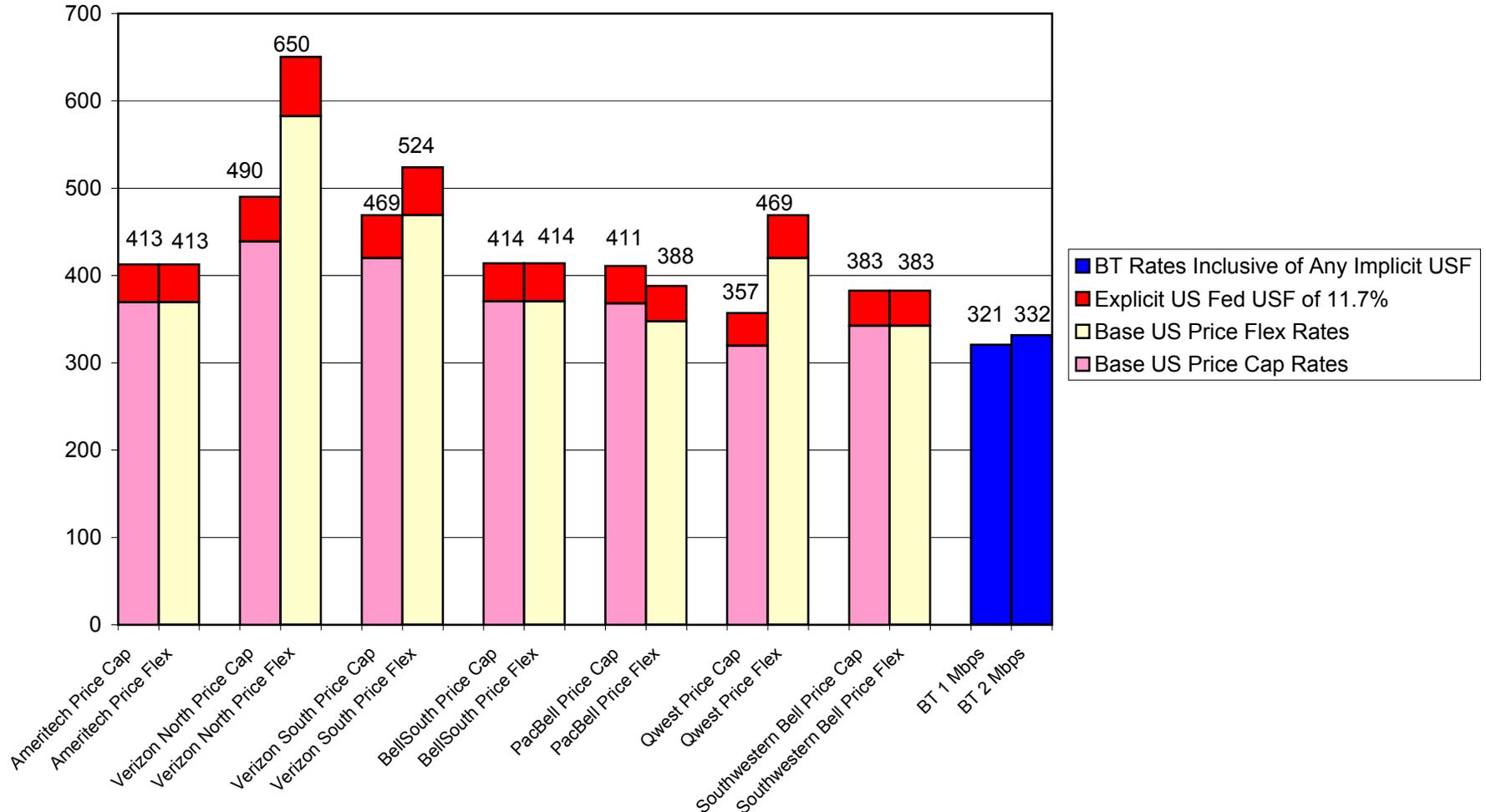
**US 1.5 Mbps Price Cap and Price Flex Rates (Zone 1)
Compared to BT's UK 1 Mbps and 2 Mbps Rates
(Data as of March 2007)**



**Assumptions: Less than 10 miles interoffice. Less than 1 mile channel terminations at each end.
5 year term rates.**

BT's UK prices converted using OECD's 2006 US/UK Purchasing Power Parities Rate of 1.62. PPPs are more representative of the purchasing power of different currencies in their home countries for a given basket of goods and hence the OECD uses PPPs in its telecoms rate comparisons across countries.

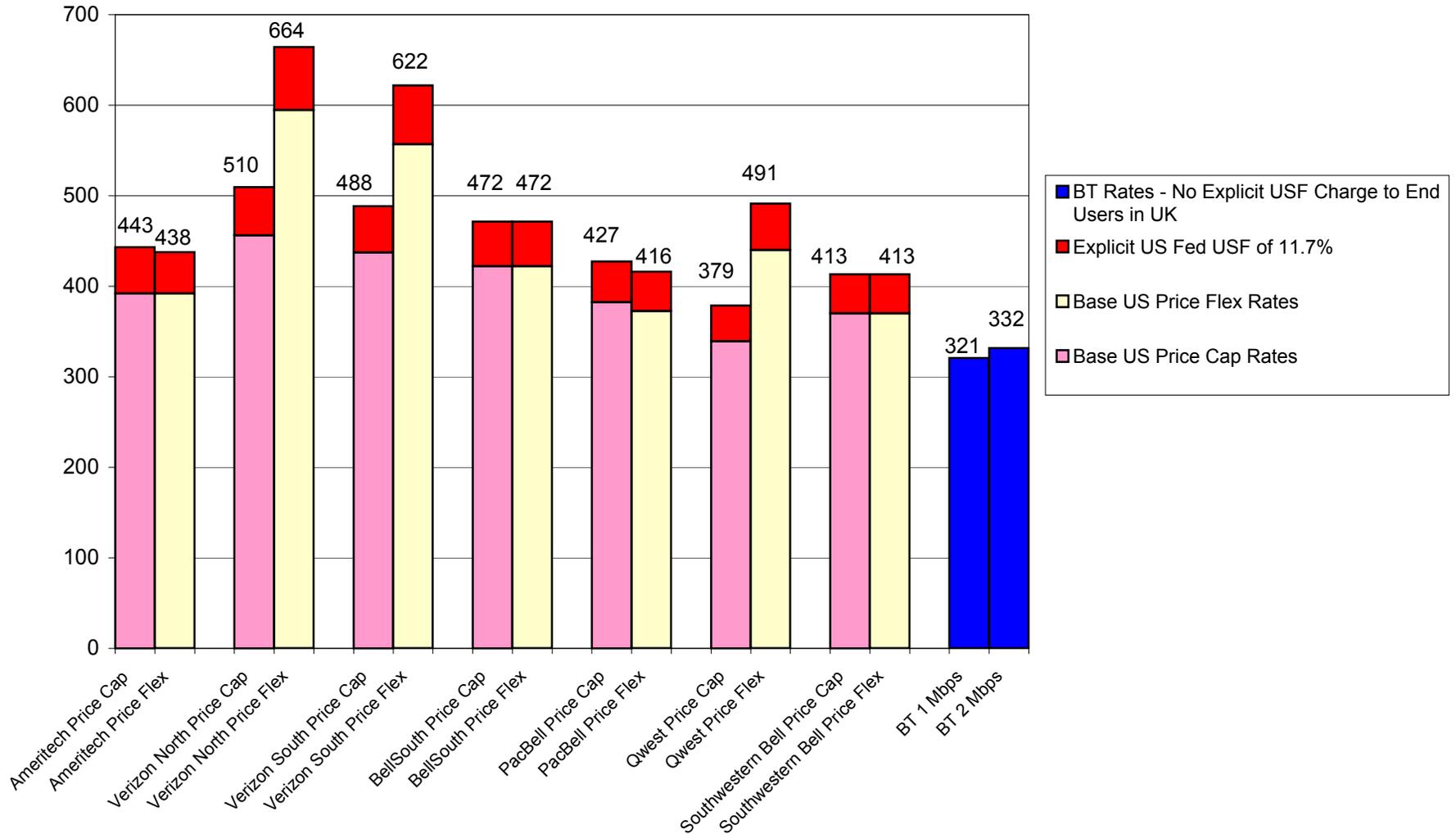
**US 1.5 Mbps Price Cap and Price Flex Rates (Zone 2)
Compared to BT's UK 1 Mbps and 2 Mbps Rates
(Data as of March 2007)**



**Assumptions: Less than 10 miles interoffice. Less than 1 mile channel terminations at each end.
5 year term rates.**

BT's UK prices converted using OECD's 2006 US/UK Purchasing Power Parities Rate of 1.62. PPPs are more representative of the purchasing power of different currencies in their home countries for a given basket of goods and hence the OECD uses PPPs in its telecoms rate comparisons across countries.

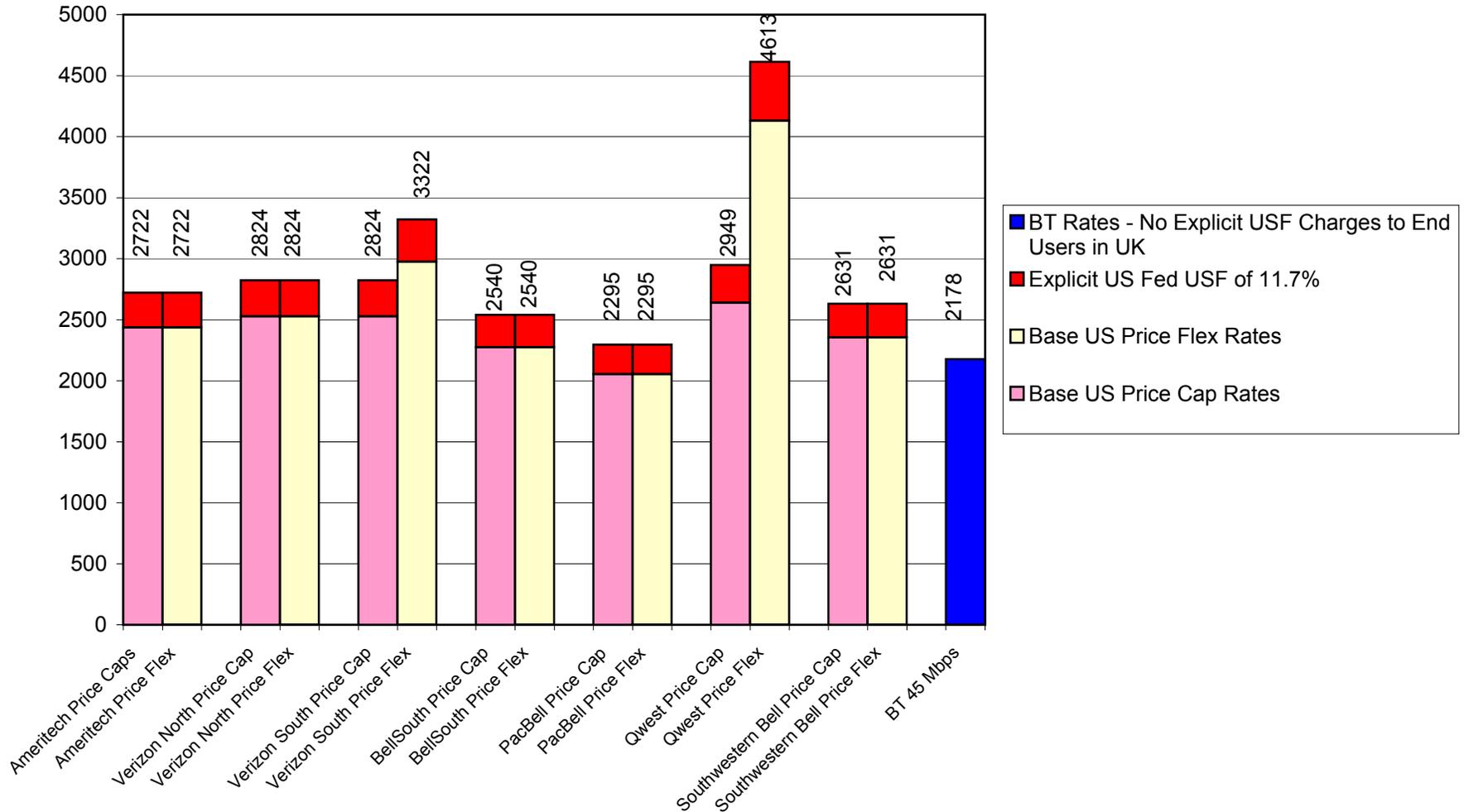
**US 1.5 Mbps Price Cap and Price Flex Rates (Zone 3)
Compared to BT's UK 1 Mbps and 2 Mbps Rates
(Data as of March 2007)**



**Assumptions: Less than 10 miles interoffice. Less than 1 mile channel terminations at each end.
5 year term rates.**

BT's UK prices converted using OECD's 2006 US/UK Purchasing Power Parities Rate of 1.62. PPPs are more representative of the purchasing power of different currencies in their home countries for a given basket of goods and hence the OECD uses PPPs in its telecoms rate comparisons across countries.

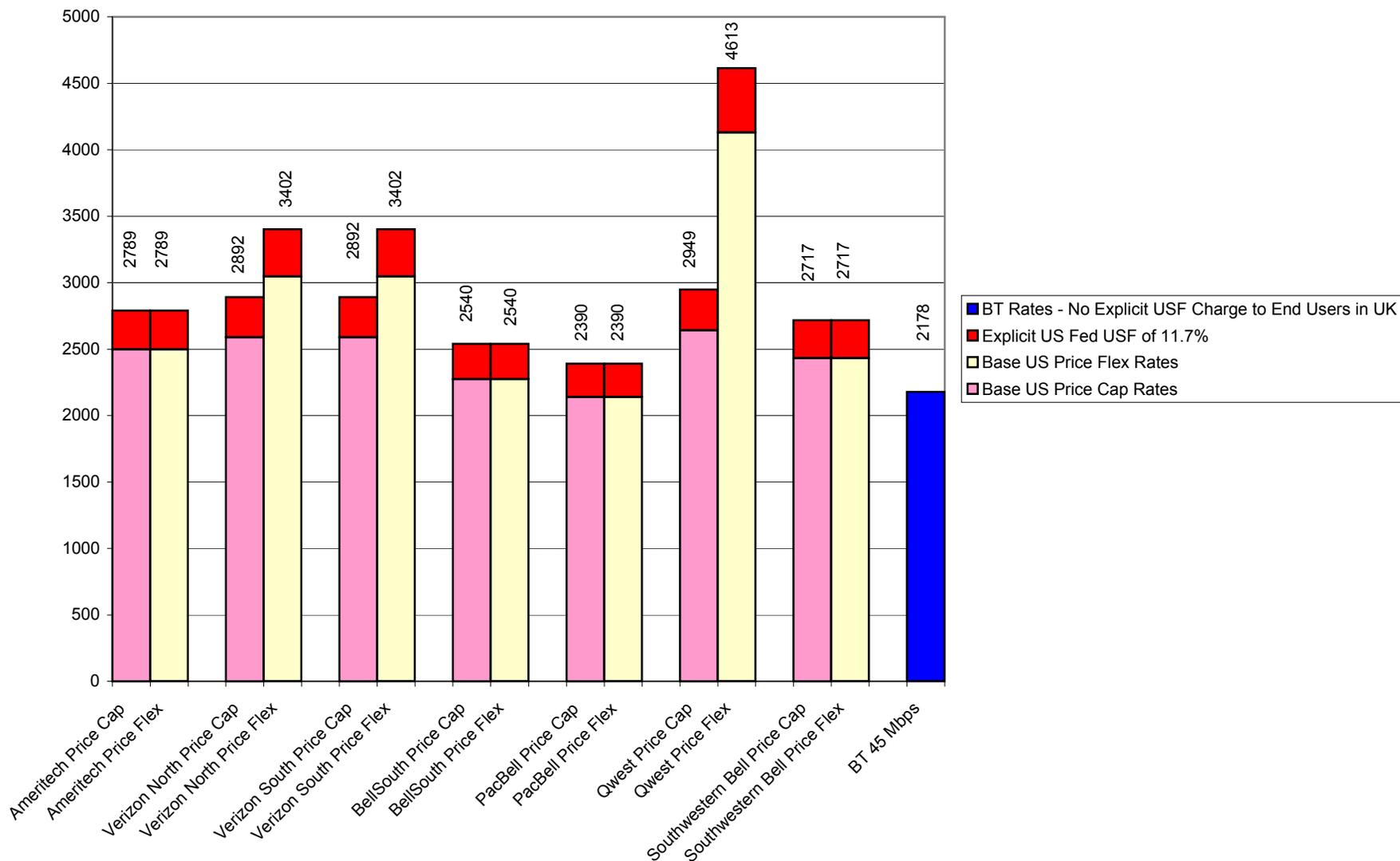
**US 45 Mbps and Price Cap and Flex Rates (Zone 1)
Compared to BT's UK 45 Mbps Rate
(Data as of March 2007)**



**Assumptions: Less than 10 miles interoffice. Less than 1 mile channel terminations at each end.
5 year term rates.**

BT's UK prices converted using OECD's 2006 US/UK Purchasing Power Parities Rate of 1.62. PPPs are more representative of the purchasing power of different currencies in their home countries for a given basket of goods and hence the OECD uses PPPs in its telecoms rate comparisons across countries.

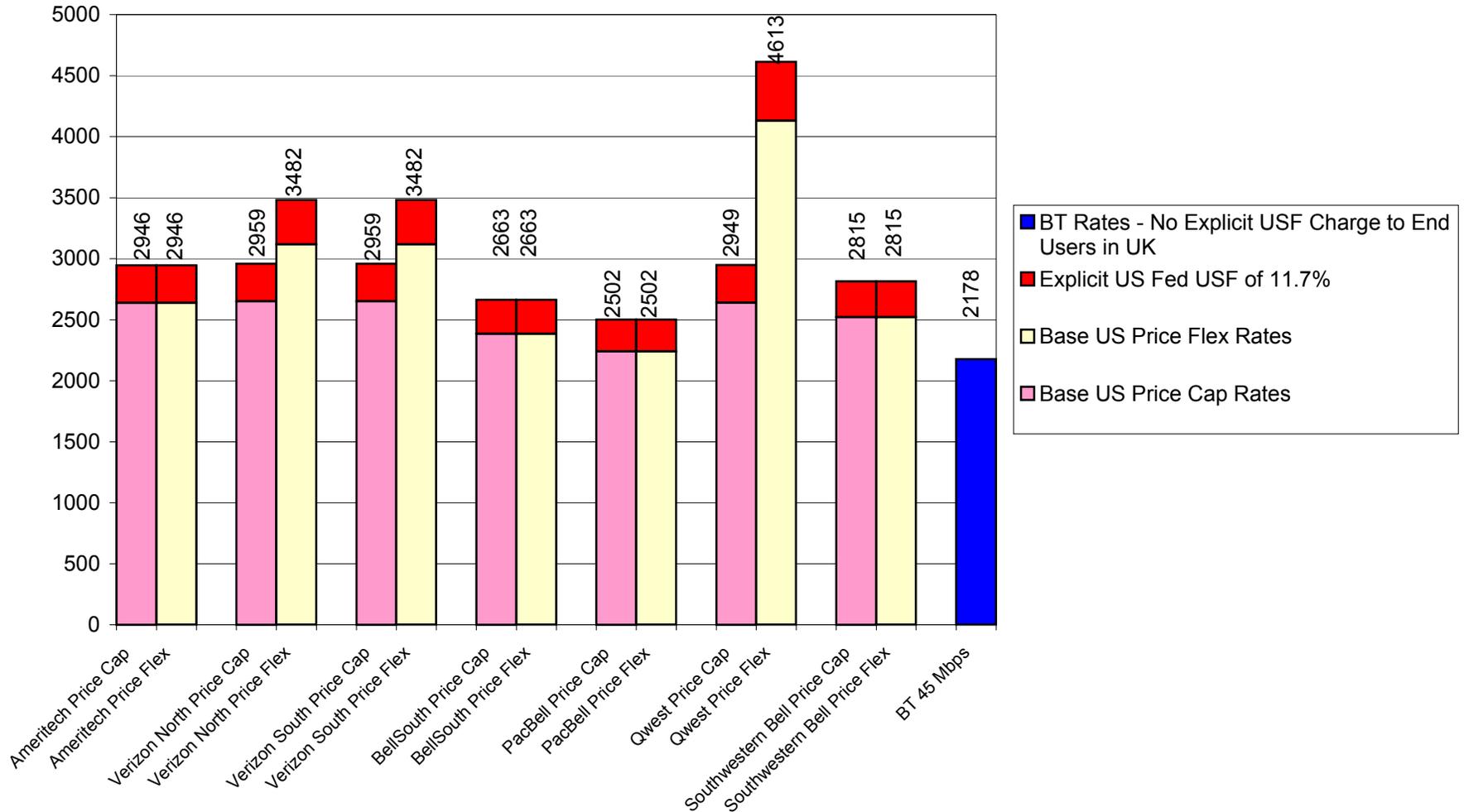
US 45 Mbps Price Cap and Price Flex Rates (Zone 2) Compared to BT's UK 45 Mbps Rates (Data as of March 2007)



**Assumptions: Less than 10 miles interoffice. Less than 1 mile channel terminations at each end.
5 year term rates.**

BT's UK prices converted using OECD's 2006 US/UK Purchasing Power Parities Rate of 1.62. PPPs are more representative of the purchasing power of different currencies in their home countries for a given basket of goods and hence the OECD uses PPPs in its telecoms rate comparisons across countries.

**US 45 Mbps Price Cap and Price Flex Rates (Zone 3)
Compared to BT's UK 45 Mbps Rate
(Data as of March 2007)**



Assumptions: Less than 10 miles interoffice. Less than 1 mile channel terminations at each end.
5 year term rates.

BT's UK prices converted using OECD's 2006 US/UK Purchasing Power Parities Rate of 1.62. PPPs are more representative of the purchasing power of different currencies in their home countries for a given basket of goods and hence the OECD uses PPPs in its telecoms rate comparisons across countries.

Notes:

- (1) For ILEC Rates: **Ameritech:** Price Cap Rates: Ameritech Tariff FCC No. 2, Sec. 7.5.9(B) and 7.5.9(C). Price Flex Rates: Ameritech Tariff FCC No. 2, Sec. 21.5.2.7(B) and Sec. 21.5.2.7(C). **BellSouth:** Price Cap Rates: BellSouth Tariff FCC No. 1, Sec. 7.5.9 (A) and (B). Price Flex Rates: BellSouth Tariff FCC No. 1, Sec. 23.5.2.9 (A) and (B). **Pacific Bell:** Price Cap Rates: Pacific Bell Tariff FCC No. 1, Sec. 7.5.9 (A), (B), and (I). Price Flex Rates: Pacific Bell Tariff FCC No. 1, Sec. 31.5.2.7 (A), (B), and (I). **Qwest:** Price Cap Rates: Qwest Tariff FCC No. 1, Sec. 7.11.4 (A) and (C) for DS1, Qwest Tariff FCC No. 1, Sec. 7.12.4 (A) for DS3. Price Flex Rates: Qwest Tariff FCC No. 1, Sec. 17.2.11(A) for DS1 channel term; Qwest Tariff FCC No. 1, Sec. 17.2.11(C) for DS1 transport channel; Qwest Tariff FCC No. 1, Sec. 17.2.12(A) for DS3 channel term; Qwest Tariff FCC No. 1, Sec. 17.2.12(A) for DS3 transport channel. **Southwestern Bell:** Price Cap Rates: Southwestern Bell Telephone Company Tariff FCC No. 73, Sec. 7.3.10 (F) DS1 Term Payment Plan; Southwestern Bell Telephone Company Tariff FCC No. 73, Sec. 20.5 MegaLink Custom Service. Price Flex Rates: Southwestern Bell Telephone Company Tariff FCC No. 73, Sec. 39.5.2.7 DS1 Term Payment Plan; Southwestern Bell Telephone Company Tariff FCC No. 73, Sec. 39.5.2.12 MegaLink Custom Services. **Verizon:** Price Cap Rates: Verizon Tariff FCC No. 11, Sec. 31.7.9 (A) and (B). Price Flex Rates: Verizon Tariff FCC No. 11, Sec. 30.7.9 (A) and (B). *See also*, Verizon Tariff FCC No. 11, Sec. 25.1 Commitment Discount Plans; Verizon Tariff FCC No. 1, Sec. 7.5.9 and 7.5.16; and Verizon Tariff FCC No. 1, Sec. 25.1 Commitment Discount Plan.
- (2) For BT Rates, BT Wholesale, Carrier Price List, section B8.02. see http://www.btwholesale.com/application?pageid=cplHub&nodeId=navigation/node/data/service_and_support/pricing/cpl/cpl_pricing_hub
- (3) BT rates converted at US UK PPP rate for 2006, http://www.oecd.org/document/47/0,3343,en_2649_34357_36202863_1_1_1_1.0.html; *See also*, <http://www.econstats.com/weo/C171V023.htm>