Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF COMPTEL

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TABLE OF CONTENTS

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	)	
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I. Introduction and Summary

COMPTEL respectfully submits these comments, pursuant to the Commission's Public Notice ("*Notice*") released on July 9, 2007 (FCC 07-123) in the above-referenced dockets. In its *Notice* the Commission invites parties to update the record pertaining to the *Special Access NPRM*.[1] Specifically, the Commission seeks comment on the impact of the special access pricing flexibility rules and the recent mergers on the availability of competitive special access facilities and providers, and how special access pricing affects the price and availability of wireless services.

As COMPTEL and others have demonstrated time and time again in this docket and the recent merger proceedings, there is a clear market failure in the special access

[1] *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM -10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005)("*Special Access NPRM*" or "*NPRM*").

market. The Bells, in particular AT&T and Verizon, have been permitted to continue to grow their already entrenched market power in the special access market with none of the usual pricing responsibilities associated with dominant providers. Meanwhile, Qwest continues to exercise its market power unabated, especially in areas where the Commission has augmented its ability to foreclose competition and extract higher prices from carriers and large customers.

Indeed, based upon what have proven to be invalid indicia of competition, the Bells have been granted pricing flexibility, which has resulted in increased prices unconstrained by either the "market" (in the form of competitors) or the regulator. This lack of competitive or regulatory discipline has also allowed the Bells to move most of their special access services into "optional" pricing contracts that pose an ongoing barrier to facilities-based competitive entry into the special access market because they severely foreclose access to customers and distort entry decisions. Special access is a major component of wireless, broadband Internet access, and other downstream services as well as adjacent "upstream" services like Internet backbone service. Therefore, the pricing of special access has a significant impact on the ultimate pricing and competitive availability of these services.

While the Commission asks parties to refresh the record in this proceeding, the Commission already possesses a substantial amount of additional relevant data by virtue of its investigations in recent Bell/IXC and Bell/Bell merger proceedings. More specifically, since the special access market was a major issue in these proceedings, a significant amount of data was provided to the Commission on this matter by the Bell applicants as well as competitors. In order to expedite the completion of the record in this proceeding, the Commission should incorporate the un-redacted records established in the merger proceedings – particularly the relevant Merger Orders - and make them available for comment, subject to the *Protective Order*[2] adopted in this proceeding. Even limiting the data incorporated in this record to non-party-specific information from the Merger Orders themselves would produce helpful information for the Commission to definitively conclude—as it has in the past—that the special access market is extremely concentrated and the incumbents continue to possess market power, the exercise of which prevents these markets from performing as competitive markets would.

In order to diminish the harms to the special access market (and the many adjacent markets dependant on special access as an input or an end-user service) resulting from the market power the Bells have been permitted to maintain, exploit and expand over the years, the Commission needs to take action immediately to bring prices more in line with prices that would result from a competitive market. The Commission could use rates charged by competitive carriers, TELRIC, or any other appropriate methodology to determine the competitive rate level. It is also critical that the Commission eliminate certain discriminatory practices utilized by the Bells that have resulted in barriers to efficient entry by new access competitors, and barriers to expansion by existing access competitors and adjacent market competitors. Chief among these artificial entry barriers are the Bells' price and term "discount" contract structures which lock in purchasers at supra-competitive price levels, restrict the growth of competitive providers by creating

[2] *Special Access Rates for Price Cap Local Exchange Carriers*, Order, WC Docket No. 05-25, DA 05-1635 (2005).

discount structures that foreclose economic entry, and restrict the amount of demand available to competitors through the aforementioned "lock in" provisions.[3]

Finally, if the Commission fails to hold the Bells accountable for the extensive market power it has passively allowed them to maintain and grow, by addressing the astronomical and anti-competitive pricing of special access by the Bells in a real and credible manner, and, instead, continues to ignore this growing problem in a multi-billion dollar industry, it must clearly state that it is abdicating its authority to regulate competitive pricing and practices in the special access market so that this issue can be addressed as an antitrust matter through the courts.

II. There Is Clear Evidence of Market Failure in the Special Access Market

In 1999, the Commission adopted the *Price Flexibility Order*,[4] which developed competitive triggers that allowed price cap carriers satisfying those triggers to offer special access services at unregulated rates through generally available and individually negotiated tariffs (*i.e.*, contract tariffs). The Commission explained that "[t]he pricing flexibility framework ... [was] designed to grant greater flexibility to price cap LECs as competition develops, *while ensuring that: (1) price cap LECs do not use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior; and (2)*

[3] In addition to addressing the prices of DS1 and DS3 channel terminations and mileage, the Commission should prevent the bundling of channel terminations with mileage or any other service such as Ethernet. In other words, every transmission service must be available a la carte. Prices can be flexible for SONET rings and other "competitive" services, but they cannot be sold as part of a discounted bundle which requires the purchase of the lower and higher bandwidth services together.

[4] *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*").

price cap LECs do not increase rates to unreasonable levels for customers that lack competitive alternatives."[5]

The Commission, in its *Notice,* asks whether the special access pricing flexibility rules have worked as intended.[6] The answer is a resounding "NO". The pricing flexibility framework has failed to protect consumers and competition from Bell anticompetitive behavior once the Bells were freed from price cap regulations. Instead, pricing flexibility rules have resulted in higher prices and more exclusionary terms. As COMPTEL and numerous other commenters in this and other proceedings have demonstrated, the tariff prices for special access have increased and the pricing flexibility rules have allowed the Bells to establish contracts that make it virtually impossible for competitors to win customers away from the Bells.

The Commission has acknowledged that the pricing flexibility rules were developed based on the Commission's predictive judgment.[7] The indicia the Commission relied upon to assess the presence or likelihood of competition, however, has been proven faulty. As the Government Accountability Office ("GAO") stated in its recent report on the extent of competition in special access services, the "FCC uses various data to assess competition in [special] access, but these data are limited in their ability to describe the state of competition accurately."[8] The Sixth Circuit has previously

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[5] *Special Access NPRM* at ¶ 18 *citing Pricing Flexibility Order* at ¶ 3(*emphasis added*).

[6] *Notice* at 1.

[7] *See Special Access NPRM* at ¶ 5.

[8] Government Accountability Office, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Service*, Report 07-80, "What GAO Found" (Nov. 2006)("*GAO Report*").

rejected the Commission's predictive judgment when it makes little common sense and there is no supporting statistical data or general economic theory.[9] Like in the Sixth Circuit case, the Commission's predictive judgment here makes little common sense. Indeed, the Commission's pricing flexibility triggers - based on collocation and transport facilities – fail to address one of the most critical service components that is actually being deregulated – the loop. The existence of collocations is largely irrelevant unless hypothetical access market competitors can use these collocations to make use of cost-based unbundled network elements ("UNEs") that would allow them to provide a competitive service. The fact that wholesale carriers cannot use enhance extended links ("EELs") to provide simple exchange access, and the fact that dark fiber has been eliminated as a UNE, have completely eliminated any plausible theory that collocations are correlated with competition in the markets for channel terminations, or even channel mileage (interoffice transport).

Moreover, even with respect to channel mileage, the grant of pricing flexibility has also often been based on factors that subsequent events have rendered meaningless. In most cases, pricing flexibility was granted based on the existence of transmission facilities of companies that are now either bankrupt or acquired by AT&T and Verizon (most significantly, MCI and the former AT&T). Furthermore, current data refutes the accuracy of the Commission's predictive judgement. The price of special access services, the rates of return the Bells receive on the service, and purchasers' behavior prove that the Commission's predictive judgment was sorely wrong and needs to be reassessed.

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[9] *Cincinnati Bell Telephone Company, et al, v. FCC*, 69 F.3d 752, 760 (6th Cir. 1995).

Pricing. The current pricing of special access clearly demonstrates the lack of a competitive market. The *GAO Report* states that "in areas where FCC granted full pricing flexibility due to the presumed presence of competitive alternatives, list prices and average revenues tend to be higher than or the same as list prices and average revenues in areas still under some FCC price regulation."[10] This fact is powerfully demonstrated in the recent petition filed by McLeod in the *Qwest Omaha Forbearance* proceeding. The Eben Declaration compares Qwest's DS1 Termination Price Cap rates with Phase II Price Flexibility rates and shows that "Qwest's special access DS1 rates have increased dramatically since it obtained Phase II special access pricing flexibility in the Omaha MSA."[11] The ***rates are 32% to 46% higher than*** the price cap DS1 rates that would otherwise apply ***had it not received Phase II special access price relief***.[12] Moreover, the special access rates are substantially higher than the cost-based UNE rates. For instance, the Eben Declaration shows that a DS1 special access circuit in Zone 1 is $105.80, which is ***138% more*** than the UNE rate.[13] Even if the carrier availed itself to the ***discounts*** provided through Qwest's exclusionary contract offering (which requires

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[10] *GAO Report*, "What GAO Found."

[11] Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223, Eben Declaration at 4 (filed Jul. 23, 2007)("Eben Declaration").

[12] *Id*, Table 2.

[13] Eben Declaration at 2-3. ["[T]he monthly recurring charge ("MRC") for a Zone 1 DS1 UNE loop is $74.88, plus a $1.54 cross-connect charge, for a total MRC of $76.42 In contrast, the Zone 1 MRC for a DS1 special access channel termination is $165.00, plus a $17.22 cross-connect charge, for a total MRC of $182.22."]

that the customer purchase 90% of its entire demand throughout the Qwest 14-state region from Qwest), the discounted price is ***still 91% to 111% higher*** in three zones.[14]

The Qwest example provided by McLeod is particularly compelling, given the expected lack of examples from the AT&T and Verizon ILEC regions. While AT&T and Verizon have certainly acquired even more market power and more incentives to exploit that market power in secondary markets, these two firms have been, for the greater part of the last two years, subject to the temporary and voluntary restraints they accepted in return for the Commission's assent to their further consolidation and accretion of market power via merger.

<u>Rate of Return</u>. Another demonstration of the market failure is that although Bells rates of return on special access were already extraordinarily high, they have increased significantly over the past few years. Rates of return for the Bells in 2004 were as follows: Verizon 31.5%, SBC 76.8%, Qwest 76.8%, and BellSouth 81.9%.[15] More recently, rates of return for the Bells in 2006 are as follows: AT&T 99.6%, Qwest 132.2% and Verizon 51.4%.[16] Competitive markets do not produce such levels of returns.

<u>Purchaser Behavior</u>. Further proof of the Bell chokehold on the special access market is the fact that retail providers of downstream services buy almost all of their

[14] Eben Declaration at 5-6.

[15] Comments of COMPTEL *et al*, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM -10593, p. 4 (filed June 13, 2005).

[16] Computed from ARMIS 43-01, Table 1 data, Net Return (row 1915, column s) divided by Average Net Investment (row 1910, column s).

special access input from the Bells. No item of data is more relevant to the actual presence of competition than purchaser behavior. If purchasers truly had a choice, why would they pay the excessive special access rates offered by the Bells? Yet, Sprint Nextel stated in the BellSouth/AT&T merger proceeding that it had no alternative to the Bells for more than ***99%*** of its PCS cell sites in the BellSouth/AT&T service areas.[17] T-Mobile stated in the same merger proceeding that "in the respective AT&T and BellSouth service areas, there are ***virtually no alternatives to special access*** links provided by [the Bells] from T-Mobile's cell sites to the [Bells'] central offices and between the [Bells'] central offices."[18] Even AT&T Wireless, before its merger with Cingular, noted that 90% of its transport costs go to ILEC special access.[19] While the high level of dependence on the ILECs was previously somewhat mitigated by the presence of MCI and the former AT&T in the market, these entities are no longer independent and therefore provide no alleviation.

III. Bell Exclusionary Contracts Prevent Competition From Developing

The Bells' unchecked market power has not only resulted in supra-competitive pricing in the special access market, it has also allowed the Bells to extract anticompetitive terms in their contracts that, in turn, prevent competition from developing, regardless of whether or not competitors otherwise have the facilities or

[17] Comments of Sprint Nextel Corporation, *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74, p. i (filed June 2006).

[18] Comments of T-Mobile USA, Inc. on Proposed Conditions, *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74, DA 06-2035, pp. 3-4 (filed Oct. 2006).

[19] Comments of AT&T Wireless Services, Inc., *AT&T Corp. Petition to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service*, RM-10593, p. 3 (filed Dec. 2, 2002).

desire to compete, which further entrenches the Bells control of the market. This is why the CLEC data, which the Bells' repeatedly ask for, is irrelevant. Even if the CLECs had the facilities to compete in discrete geographic areas, they do not have the scale and scope to compete with the Bells for the major purchasers of special access. Because most large business customers desiring special access have multiple locations, [20] the Bell - as the only carrier able to meet the entire need of the customer – prices its service on a wider basis than an individual building. As Verizon itself explained to a U.S. District Court only last year,

> [Almost all of the access-based services that competitors sell is sold to] the retail enterprise customer, about 95 percent or maybe a little more, is bought by these kinds of large customers. And what they buy is a package of service that covers not just a connection to a building, but Internet access and long distance telecommunications and global international services. And they buy in all their locations. And these kinds of customer typically have many locations that have to be knit together. So it's not just one building with a fiber connection, it's a lot of buildings and a lot of stuff in the middle."[21]

By pricing its service on a wider basis than an individual building, the Bell contracts bind the purchaser to the Bell services across its region; preventing the purchaser from buying from a competitor even in the discrete areas where competitors may have a presence.

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[20] *See* Joint Opposition of SBC Communications Inc., *et al*, CC Docket 98-141, Reply Affidavit of James Kahan, pp. 11-12 (filed Nov. 16, 1998)["In order to have an opportunity to be considered along with our competitor/opponents to serve these large corporate customers, we believe that 70-80% coverage of the customers local and long distance expenditures is critical. It is at this point that SBC can become a viable candidate for delivering telecommunications services as a primary carrier, as opposed to a niche carrier."]

[21] John Thorne, Verizon Communications, Transcript of July 12, 2006, Oral Argument in *United States v. Verizon Communications, Inc. et al.*, Docket Nos. CA-05-2102 and CA-05-2103, pp. 93-94("Tunney Act Proceeding").

The key feature of these optional pricing plans is that in order to get "discounts" on circuits for which they have no competitive alternative (the vast majority of circuits) customers, like COMPTEL members, must commit to purchasing the majority of their total circuit volumes from the Bells – including circuits for which a cheaper competitive alternative may be available. In other words, because only the incumbent can supply all of any customer's special access demand, the incumbent can condition the availability of discounts on certain circuits (the majority, for which no competitive alternative is available) on the customer's commitment to transfer the "competitively sensitive" portion of its demand to the incumbent. Another feature of these contracts that allows the Bells to effectively tie up the market is the prevalent requirement that customers who cannot meet their volume commitments are required to pay high "termination" penalties. These features prevent a customer from migrating its service to a competitor that enters a market.

As explained in the Farrell Declaration accompanying COMPTEL's 2005 reply comments in this proceeding, competitors have to offer extremely steep discounts off the Bells tariff price in order to win any modest portion of the customer's business.[22] In this respect, these optional pricing plans – which are pervasive – foreclose circuit demand from potential competitors of the incumbents for special access services. They may even prevent carrier customers from building their own facilities to meet their own needs because doing so may cause these purchasers of special access to fall short of the volume

[22] *See* Reply Comments of COMPTEL, *et al*, WC Docket No. 05-25 and RM-10593, Reply Declaration of Joseph Farrell, ¶¶ 11 and 14 (filed Jul. 29, 2005)("Farrell Declaration").

commitments needed for the discount under their existing (potentially long-term) special access agreements.

The Eben Declaration describes one such plan offered by Qwest, known as the Regional Commitment Plan ("RCP"). As explained in the declaration, in order to receive a discount, a customer must commit to the RCP for a minimum of 90% of its total Qwest-provided in-service DS1 and DS3 service circuits, respectively, within Qwest's entire 14-state region.[23] These terms would prevent a carrier from using UNEs or a competitor to Qwest in areas where such alternatives are available. Global Crossing, in an *ex parte* letter in the AT&T/BellSouth merger proceeding, outlined similar anticompetitive volume discount plans offered by AT&T and BellSouth.[24] Global Crossing also cataloged the exclusionary tariffs used by AT&T (then SBC) and Verizon in its June 1, 2005 *ex parte* presentation in the SBC/AT&T and Verizon/MCI merger proceedings.[25] Finally, COMPTEL, Global Crossing, and NuVox Communications explained in great detail the effects of these exclusionary practices in a Declaration by the former chief economist for the Commission and the Antitrust Division of the United States Department of Justice, Joseph Farrell.[26]

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[23] Eben Declaration at 4-5.

[24] Letter of Alfred E. Mottur, Brownstein, Hyatt, Farber, on behalf of Global Crossing, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, p. 9 (filed Sep. 13, 2006)(redacted version)("Global Crossing Ex Parte").

[25] *See* Global Crossing *Ex Parte* Notice, WC Docket No. 05-75, at 11-12 (filed Jun. 2, 2005).

[26] *See* Farrell Declaration at ¶¶ 3-21.

It is important to consider, when trying to conceptualize how the optional pricing plans work, that the incumbent gets to set the minimum scale of entry for its competitors, by exchanging "discounts" on products for which demand is inelastic (customers have no alternative) for commitments to purchase from the incumbent (*i.e.*, not buy from competitors) services for which the customer could otherwise chose a competitor. Thus, the incumbent can choose to bundle demand for the same product over a large geographic region to include the inelastic product (on which discounts are offered), and/or the incumbent could decide to "discount" lower capacity circuits (for which the incumbent's "first mover" status and scale/scope economies give it a tremendous advantage over new entrants) as the basis on which it will foreclose demand from rivals in exchange for a commitment to purchase higher capacity circuits.[27]

Regardless of which methods are used, the end result is that the incumbent is able to raise the costs of its competitors by expanding the scale on which they would have to enter, or the incumbent is able to limit competitors' revenue opportunities by raising the size of the discount they would have to offer to make their customer indifferent between buying from the competitor or the incumbent. Similarly, contracts that contain exclusionary discount plans also require a huge demand commitment from prospective customers of competitive carriers, which also limits the competitor's ability to expand quickly (by foreclosing demand/sales opportunity).

The leading treatise on antitrust law explains the pernicious effect these so-called "bundled discount" contracts can have on competition for the could-be-competitive good or service:

[27] *See e.g.*, The Verizon Telephone Companies Tariff F.C.C. No. 1, 21.46, Contract Tariff Option 45, (B).

> Multi-product discounts aggregated over a prolonged period can in fact be used strategically with anticompetitive results. The difficult question is the formulation of an administrable rule that does not overreach and condemn competitive conduct. In [the Third Circuit case discussed] the discounts at issues [sic] apparently did not produce significant cost savings, but did a great deal of harm to the only surviving competitor. As a result, the majority's treatment seems consistent with our definition of exclusionary conduct as acts that: (1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits that the acts produce, or (2c) produce harms disproportionate to the resulting benefits.[28]

Areeda, however, cautions against the indiscriminate application of this suggested rule:

> Indeed, unless there is evidence of collusive behavior we would be reluctant to extend the doctrine to any situation in which there was *at least one competing firm able to match the defendant's discount* ***across all product lines***.[29]

Every Bell "discount plan"—for the reasons explained by Professor Farrell and the *Areeda* treatise—would fail under the proposed *Areeda* test. First, it is clear that these contracts limit revenue opportunities of rivals. Second, customers obtain no real benefit because the Bells are generally free to raise the tariff price on which the contract "discount" is based (consider the Qwest example where the RCP "discount" resulted in a huge increase over the price cap rate -- not to mention the cost-based TELRIC rate). Moreover, the "discount plans" are unnecessary because the pro-consumer purpose of allowing pricing flexibility was to allow the incumbent the flexibility to retain business on a discrete basis—where markets had become workably competitive—not to allow the Bells the freedom to insulate these very markets from the limited competition that might exist, and more perfectly exploit their *regional* (not MSA-specific) market power.

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[28] Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law, Vol. 3, ¶ 749 (internal citation omitted)("*Areeda*").

[29] *Areeda,* ¶ 749(*emphasis added*).

Finally, it is obvious that the Bells more than meet the limited instances where *Areeda* would declare these contract provisions unlawfully anticompetitive. The Bells have never even attempted to identify "*at least one competing firm able to match the defendant's discount across all product lines.*"[30]

The SBC/AT&T, Verizon/MCI, and AT&T/BellSouth mergers only intensified the concentration, lack of competition, and consequential harm to the special access market. The SBC/AT&T and Verizon/MCI mergers resulted in the loss of the biggest competitors and purchasers of special access, *i.e.*, the carriers most capable of curbing the Bells' anticompetitive behavior.

The AT&T/BellSouth merger did even more harm to the special access market by expanding the Bell's footprint. Specifically, because the acquisition allows AT&T to offer selective "discounts" on special access services over an even greater monopoly territory, AT&T is able to demand an even greater percentage of purchases of special access services where a potential competitor exists. Thus, the expansion of territory over which AT&T has market power in the sale of special access services further enhances AT&T's ability to frustrate any possibility that a competitor could win a customer from it. Indeed, it increases the discount a competitive carrier would have to offer to gain a small portion of the business. In other words, merger activity in the past two years makes it even more unlikely the Bells can identify even one firm capable of matching their discounts across all product lines. Thus, the Commissioin must eliminate this anticompetitive practice immediately.

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[30] *Areeda* at ¶ 749 (*emphasis added*).

IV. Pricing of Special Access Impacts the Pricing of Adjacent Market Services.

Special access competition and pricing were major issues raised in the SBC/AT&T, Verizon/MCI, and AT&T/BellSouth merger proceedings. In fact, based on the record in those proceedings, the merger applicants made certain commitments enforceable by the Commission related to the provisioning and pricing of special access. But while these conditions may have stabilized the market in the AT&T and Verizon regions – with the intent to prevent the mergers from making the situation worse – they by no means cured the problem. The Commission, at the time, decided that, for the most part, the applicants' abilities to increase prices or discriminate in the provision of special access services should be addressed in the pending general rulemaking proceedings.[31] This time is well overdue.

Special access, while initially a niche market, is now a key input to virtually all telecommunication services. As the Commission recognized in the *SBC-AT&T Merger Order*, "wholesale special access service is a critical input for: competitive LECs in providing services to their retail enterprise customers, wireless and competitive LECs in connecting their networks to other carriers, long distance carries seeking to connect customers to their long-distance networks, and entities seeking to connect with the Internet backbone."[32] Consequently, the price and lack of competitive choices in the

[31] *See e.g., SBC Communications Inc. and AT&T Corp., Applications for Approval of Transfer of Control,* Memorandum Opinion and Order, 20 FCC Rcd. 18290, WC Docket No. 05-65, FCC 05-183, ¶35 (2005)("*SBC-AT&T Merger Order*").

[32] *SBC-AT&T Merger Oder* at ¶ 24.

special access market have significant impacts on the pricing and competitive choices for numerous other wholesale and retail services.

The Commission, around the same time it agreed to issue this *NPRM*, specifically noted the dangers to all telecommunications services that can result from having only one, unregulated monopoly provider of dedicated transmission service. In its *Triennial Review Remand Order* ("*TRRO*"), the Commission explained,

> [the inability to obtain cost-based inputs on the same scale and scope as the incumbents simply because] competitors had access to tariffed alternatives would diminish the facilities-based competition that is the most effective discipline to anticompetitive price squeezes. Such a rule would allow an unacceptable level of incumbent LEC abuse because incumbent carriers could strategically manipulate the price of their direct competitors' wholesale inputs to prevent competition in the downstream retail market. Moreover, we believe that the uncertainty and risk associated with even the possibility of such abuse would chill competitive entry, because competitive carriers might well be averse to initiating service when they know that the incumbent could – on one day's notice, without Commission approval, and with limited market-based discipline – render competition untenable by raising tariffed prices.[33]

One service that relies heavily on special access, and is thus especially vunerable to the type of price squeeze behavior the Commission described, is retail wireless services. For wireless carriers, special access is the single largest network operating cost,[34] and, as discussed above, providers are thus far dependent on the incumbent LECs

[33] *In the Matter of Unbundled Access to Incumbent LEC Networks*, Order on Remand, WC Docket No. 04-313, at ¶ 63 (rel. Feb. 4, 2005) (citation omitted).

[34] Petition to Deny of COMPTEL, *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74, pp. 9-10 (filed June 5, 2006)("COMPTEL Comments") *citing* Comments of Sprint Corportation, *In the Matter of Unbundling Obligations of Local Exchange Carriers*, CC Docket Nos. 01-338, 98-147, and 96-98, at 49 (filed Apr. 5, 2002).

to fulfill these needs. AT&T Wireless (which later merged with Cingular) has succinctly explained this vulnerability of wireless carriers on wireline incumbents,

> [Wireless] carriers are major consumers of ILEC special access services. They have no choice. Although wireless services are increasingly viewed as a form of inter-modal competition to wired telephony services, including broadband services, the ironic fact is that wireless networks out of necessity consist largely of wireline facilities. . . . These [facilities] overwhelmingly are made with landline transport facilities purchased from ILEC special access tariffs.[35]

This dependency was made worse by the elimination of the two largest – albeit minor - competitors to the Bells in the special access market. As T-Mobile observed:

> [t]he proposed Verizon-MCI and SBC-AT&T mergers . . . will if permitted to proceed, result in the two largest ILECs absorbing two of the largest independent providers of special access services. Such increased consolidation will sharpen the competitive problems of the special access marketplace to the detriment of these firms that rely on the ILECs' special access services.[36]

Thus, the Bells' ability to increase the cost of the special access services could not only increase the costs of these adjacent market services, it could provide the Bells with an extraordinary competitive advantage in downstream markets in which they compete with their wholesale customers. This market power can be used to extract more profit from consumers in the downstream market because the Bells can raise prices for the input—while keeping their retail price the same—and thereby win more market share for themselves at the same margin. Alternatively, the Bells can decide to keep their same market share static, but to increase margins in both the input and downstream markets by

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[35] Comments of AT&T Wireless Services, Inc., *AT&T Corp. Petition to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service*, RM-10593, pp. 2-3 (filed Dec. 2, 2002).

[36] Reply Comments of T-Mobile USA, Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, p. 2 (filed Jul. 29, 2005).

using the threat of total foreclosure in order to become a retail "price leader" in the retail market. In other words, the Bells can increase prices in the input market while raising retail prices for the downstream service, with the reasonable expectation that non-integrated rivals will choose to "go along to get along" and also raise their retail prices. Therefore, using the example of wireless service, it is easy to see how Bell control of the special access market significantly impacts the pricing and competitiveness of adjacent markets. The same threat, of course, now exists in the retail telecom market for integrated wireline services, as well as the Internet backbone market.

A concrete example of this type of conduct can be found in the merger of AT&T and BellSouth, which resulted in Cingular becoming a wholly-owned subsidiary of AT&T/BellSouth, thereby making rate increases - while costly to unaffiliated competitors - immaterial to AT&T's wholly owned wireless facility. These rate increases were not allowed in the special access market or in the switched access market, by virtue of time-limited merger conditions, but they have exhibited themselves in the market for wireless terminations, where AT&T's wireline monopoly has chosen to favor its wireless affiliate in order to gain market share.

A good example of this incentive being acted upon is the AT&T "Unity" offer. The description below is from AT&T's January 19th press release describing Unity.

> AT&T Unity customers can call or receive calls for free from any AT&T wireless and wireline phone numbers nationwide without incurring additional wireline usage fees or using their wireless Anytime minutes.* In addition to free domestic calling to and from AT&T numbers, the AT&T Unity plan includes wireless service with unlimited night and weekend minutes, as well as a package of Anytime Minutes.

> The AT&T Unity plan is the company's first major converged product offering since the company's Dec. 29 acquisition of BellSouth Corp. and consolidation of Cingular Wireless.
>
> To sign up for a new AT&T Unity plan, a customer needs to subscribe to AT&T wireless service and unlimited AT&T local and long distance wireline services. The bundle includes both unlimited local and long distance plans and an AT&T Unity wireless plan. Customers who subscribe to AT&T Unity have the convenience of a single bill for their AT&T wireline and wireless services.[37]

Given that wireless termination costs may not be as large a component of wireless service as special access, it is not clear what the true competitive effect of this offer will ultimately be. However, Unity does illustrate that carriers will act in accord with their incentives when a carrier dominates multiple retail and wholesale markets within a large geographic region, and how increasing rivals' costs, relative to one's own costs, can be used to extend/enhance market power across network "platforms."[38] It is not difficult to understand how dominant multi-market firms would further exploit their customers and limit competition if their market power for an input as important as special access is not constrained by the regulator until such time as effective competition can be empirically demonstrated.

[37] http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=23318

[38] What is also interesting about the Unity plan is that it could, certainly if combined with unconstrained special access market power, form the basis of a really effective territorial allocation tool. It signals other carriers to behave politely in AT&T's region. Price cutting will only hurt the competitor (increased input demand will only increase monthly backhaul and per minute costs on a per subscriber basis, and subscriber revenues will fall due to lower retail prices). However, for its biggest rival, it also signals a willingness to accept reciprocal terms.

V. If the Commission Decides Not to Regulate Special Access Services, It Should Clearly Articulate Its Decision to Not Actively Supervise Conduct in This Market

It is hardly a controversial notion for COMPTEL to advance that no one should be above the law in America. Nonetheless, the Supreme Court has recognized, but not adopted a particularly generous interpretation of, the antitrust savings clause in the Communications Act;

> [a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. As we have noted, 'careful account must be taken of the pervasive federal and state regulation characteristic of the industry.[39]

COMPTEL is concerned that a Commission decision not to actively supervise the pricing and practices of dominant firms in the special access market, may have the unintentional effect by the Commission of foreclosing or otherwise limiting the potential antitrust remedies to private plaintiffs, state attorneys general, or even the federal competition enforcement agencies. While some theories of liability might be available to antitrust plaintiffs, depending upon their theory of harm and their role as either competitor, or customer-competitor, there is also a very legitimate concern that the existence of *potential* regulation might cause a court to throw out an otherwise-viable antitrust claim. This concern has only been reinforced by the Supreme Court's recent decision to take more commerce out of the "free market" (antitrust law and the various state and federal courts that can entertain such claims) and subject that commerce to the exclusive jurisdiction of a regulatory agency.

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[39] *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) ("*Trinko*") (internal citations omitted) (analyzing the antitrust saving clause of the Telecommunications Act).

In *Credit Suisse*,[40] the Supreme Court held, essentially, that if a regulatory agency *could have* addressed the conduct that was the cause of the antitrust action, then the mere risk of a *potential* conflict between what a court would do in applying the antitrust laws versus how the regulator might act was enough to caution against allowing the antitrust claim to proceed. In *Credit Suisse*, the Court adopted a four part test for deciding to favor regulation over antitrust law:

> (1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate [agency] authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes.[41]

While, overall, the test seems difficult to meet (*i.e.*, the fourth prong requires the existence of "a serious conflict") the primary gist of the Court's decision seemed to stem from the guiding sentiment expressed in *Trinko,* that "'the additional benefit to competition provided by antitrust enforcement will tend to be small' where other laws and regulatory structures are 'designed to deter and remedy anticompetitive harm.'"[42] Thus, out of an abundance of caution, COMPTEL respectfully requests that, if the Commission does not intend to actively regulate pricing and practices with respect to special access services, that it clearly articulate this sentiment so that a court does not reject a claim of injury to competition on the mistaken assumption that the regulator would have acted if the claim had merit.

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[40] *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007) ("*Credit Suisse*").

[41] *Credit Suisse* at 2397.

[42] *Credit Suisse* at 2396, citing *Trinko* at 412.

CONCLUSION

COMPTEL respectfully requests that the FCC take responsibility for the current anticompetitive state of the special access markets and to (1) immediately bring special access prices to levels more consistent with competitive markets, and (2) eliminate anticompetitive practices, terms, and penalties which make it difficult for purchasers of access services to use competitors (where available), and for competitive providers of access to expand the scope and scale of the services they offer in competition with the incumbents.

Respectfully submitted,

_______/s/____________

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