REDACTED FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Special Access Rates for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
	)	
AT&T Corp. Petition for Rulemaking to	)	

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materialized. In the absence of competitive or regulatory discipline, ILECs have used [redacted] rates significantly above those for corresponding UNEs. Price comparisons and analysis conducted by Joint Commenters in these comments provide compelling evidence that the market has failed to work as the Commission had hoped it would. Contrary to the expectation that competition would develop to drive special access rates to competitive levels, under the Commission's PRICE-FLEX regime, special access pricing has moved away from forward-looking costs rather than toward them.

Exacerbating this market failure is the fact that, since the initial comments and replies were filed, the RBOCs have absorbed through mergers the two largest (by far) competitive providers of special access. The only competitive providers with special [redacted]

ILEC-provided special access, much to the detriment of their customers and their businesses.

The manner in which Section 271 of the Act has been implemented in many states also serves to increase the market power of ILEC special access providers. In most states, ILECs have prevailed in largely equating Section 271 loop and transport checklist items with special access thus rendering Congress's enactment of the checklist a nullity. Only a few states have acted to give Section 271 teeth by ensuring that checklist items are priced at just and reasonable rates and then, the RBOCs immediately sought to reverse

[redacted]

GAO recommended that the Commission take action to better define effective competition and to consider additional data to measure competition. The Commission's unconvincing response to the report is that the costs of regulating special access are greater than those associated with the current PRICE-FLEX regime and that measuring actual competition somehow would be impractical or infeasible.

Today, all evidence points to the fact that the Commission must remedy its unrealized prediction of competition and premature deregulation of special access by eliminating Phase II pricing flexibility and by reinitializing special access rates. While [redacted] limiting the profits a carrier might gain as rate-of-return regulation did, price cap regulation focused on the prices charged and resultant revenue earned from special access services, giving price cap LECs the incentive to reduce costs and increase efficiency in order to increase profits.[4] The initial price cap rates were set at levels existing when rate caps were imposed and then were adjusted annually based on a productivity factor (the "X-factor").

Additionally, two mechanisms allowed price cap LECs to establish rates above price cap levels. First, a low-end adjustment mechanism, whereby price cap indices were adjusted upward, was permitted if the LEC earned returns below a specified level in a given year.[5] Second, price cap LECs were allowed to set rates above the price cap levels if those rates would result in low earnings deemed to be confiscatory.[6] Thus, remedies were and continue to be available for an ILEC that believes its price cap regulated rates growing competition in certain metropolitan statistical areas ("MSAs") and allowed

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continuing regulation higher than the risk of granting premature relief.[15] Believing that the ILECs could not exercise market power where they faced competition from entrants using their own facilities,[16] the Commission down-played evidence that the ILECs possessed high market shares for special access services despite the entrance of some competitive providers. Therefore, the Commission assumed that satisfaction of the collocation triggers it established would ensure adequate competition to prevent ILECs from charging unreasonable rates to customers with no competitive alternatives, from deterring market entry, or from engaging in exclusionary pricing behavior.

Almost before the ink was dry on the first orders granting Phase II pricing flexibility, ILECs began responding to that supposed price-constraining competition by

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Court of Appeals, requesting the court to direct the Commission to take action. The mandamus petition effectively was mooted when the Commission adopted its *Special Access NPRM* in January 2005 to address the open issues raised in the *AT&T Petition for Rulemaking*.

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In response to Chairman Markey's letter, the Commission issued a Public Notice requesting interested parties to refresh the record. Joint Commenters welcome the Commission's request to refresh the record in the instant proceeding. The Commission can no longer disregard the dearth of competition and the plight of captive carriers and consumers in special access markets. This Commission should insist that price constraining competition occurs before the deregulation of rates. Furthermore, because even the regulated price cap rates are excessively higher than cost, the Commission should reset price cap rates at a "just and reasonable" level, which can be done by reinitializing the price caps with an 11.25% rate of return and by reinstating the X factor at 5.3%.

III. EVIDENCE OF MARKET FAILURE IS UNDENIABLE

A company with market power is able, among other things, to impose substantial above-cost price increases over a sustained period without losing significant demand from its customers. The Commission itself has noted that "a substantial price increase need not be a large one;"[21] therefore, even a small increase in special access rates may indicate an abuse of market power. In this case, however, special access rates have increased dramatically since the Commission adopted its pricing flexibility rules. For example, T-Mobile reports that Qwest's special access rates increased 62% between 2002 costs contrary to what is expected in competitive markets. And given that "[m]ore than half of the Bells' special access revenues come from areas where they are no longer subject to price cap regulation,"[23] this is no small concern. Because they lack competitive alternatives in most areas (despite supposedly having sufficient competition to justify pricing flexibility), special access customers competing with their ILEC suppliers must absorb these higher rates or stop serving their own retail customers. The RBOCs' special access customers must naturally pass on these rate increases to their own customers; therefore, "[b]y charging other carriers these inflated rates, the Bells also avoid retail price competition."[24]

A. Substantial and Sustained Above-Cost Rate Increases in MSAs Where ILECs Have Been Granted Phase II Pricing Flexibility and Soaring Rates of Return Provide Undeniable Evidence of Market Failure

As a direct result (and *prima facie* evidence) of rates far exceeding costs, the RBOCs' interstate special access rates of returns have skyrocketed in the years since pricing flexibility was permitted. AT&T's (based on combined legacy SBC and [redacted]

RBOC statement claiming their returns even approach this level. Simply put, claims of ARMIS data discrepancies and past under-earning cannot explain away or justify these outrageous rates of return.

The RBOCs also have argued that the increase in their special access revenues since gaining pricing flexibility in certain MSAs is due to growth in demand rather than increased and supra-competitive rates. To support their claims against reliance on the ARMIS-derived rates of return, the RBOCs try to convince the Commission that their special access revenue per line is the most relevant statistic to consider. They argue that the average revenue per line should be considered a proxy for special access rates and that the declining trend in their private calculation of those revenues indicates that special access rates also have been declining.[26] One must wonder why the RBOCs need to develop a proxy for special access prices when they have their actual pricing data at their fingertips. The reason why they hide behind a contrived annual revenue proxy is because

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conclusion that revenue per line has decreased cannot be verified because of the many assumptions and adjustments made by their economist, Dr. Taylor, in developing the revenue data.[28] Furthermore, Dr. Farrell explains that even without any price reduction, manipulation of the ARMIS access line count can show a decrease in revenue per line, based on how the number of utilized special access lines is captured in the ARMIS data.[29] Thus, average revenue per special access line does not reveal anything concrete about the RBOCs' special access prices. Furthermore, the competitor analyses of increases in actual RBOC tariffed rates from 2000-2005 belie the RBOCs' claims of reduced rates.

Finally, and critically, Dr. Farrell makes the fundamental point that even if the trend in RBOC special access rates was falling, this would not confirm a lack of market power because "[e]ven a monopoly will reduce price if marginal costs fall or if demand

GAO Report highlights[32] and as supported by competitor data analysis, the large price cap LECs consistently have increased their special access PRICE-FLEX rates well above costs. Notably, after a review of actual RBOC rates, not proxies, the GAO found that list prices and average revenues in Phase II MSAs tend to be higher than or the same as list prices and average revenues in areas still under some Commission price regulation.[33] Indeed, the GAO's analysis of 1,152 list prices and other data "generally shows that prices 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." The GAO explained:[34]

> 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.[35]

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may have been below cost, there can be no valid justification for the consistently higher rates found in Phase II MSAs than in Phase I MSAs.

A recent Progress & Freedom Foundation ("PFF") Report on special access attempts to undermine the GAO findings by asserting, although without "definitive conclusions," that pricing flexibility itself may have led to increased ILEC investment (using quantity of lines sold as a proxy for investment),[36] suggesting that the increase in ILEC output indicates no abuse of market power. This study, as its author admits, "is incomplete because it has ***no information on prices.***"[37] Its results are thus fundamentally suspect.

B. Comparisons of Special Access Prices to Forward Looking Cost-Based UNE Rates for Comparable Services Provide Compelling Evidence That, with Few Exceptions, Special Access Rates in Most Instances Are Not Just and Reasonable

The Commission has stated its preference for special access rates to move toward a cost-based rates. In the *Access Charge Reform Order* the Commission put the ILECs on notice that "[t]o the extent that competition did not fully achieve the goal of moving access rates toward costs, the Commission reserved the right to adjust rates in the future to bring them into line with forward-looking costs."[38] The best estimates of the ILECs' forward-looking costs of providing special access services are naturally the cost-based UNE rates for comparable services.[39] To provide updated pricing information for the Commission, Joint Commenters have compiled and analyzed a sampling of RBOC rates which demonstrate that the rates for special access channel terminations and mileage are, with rare exception, significantly higher than for comparable TELRIC-based UNE rates. These comparisons ultimately indicate that special access rates are excessively above cost and are therefore unjust and unreasonable.

Joint Commenters selected several states served by each RBOC and focused analysis on the highest density zone in each of those states, where costs should be the lowest in the state and the level of competition (at least theoretically) the highest.[40] These comparisons show that special access rates are substantially above forward-looking costs (with few exceptions). This disparity in pricing, especially in these high density study areas, constitutes anti-competitive behavior and the abuse of market power.

In all the states analyzed, the month-to-month recurring price cap recurring rates (no term commitment) for DS1 loops/channel terminations are vastly higher than the UNE DS1 loop rates, ranging from 67% higher in Arizona to 802% higher in Illinois.[41] The month-to-month recurring Phase II pricing flexibility rates are all at least 100% higher than the UNE DS1 loop rates, with many of the state Phase II rates 200-300% higher than the cost-based UNE rates.[42] Significantly, in all but one state surveyed, the [redacted]

In a competitive environment, one would expect that special access rates would tend to be closer to cost-based rates as customers are required to commit to longer terms of service. The data, however, does not bear that expectation out. Where the surveyed carriers offer a 1-year term commitment special access contract, both the price cap rates and the Phase II rates for DS1 channel terminations are still considerably higher than the UNE DS1 loop rates, with the price cap rates ranging from 62% higher in Arizona to 585% higher in Illinois and the Price-Flex II rates ranging from 131-607% higher.

Even 3-year special access term plans do not significantly reduce the disparity between the UNE loop rates and either the price cap rates or Phase II rates for ILEC special access channel terminations. Under available 3-year plans, price cap rates are still 52-268% higher and Phase II rates are 75-272% higher than the cost-based UNE rates.[44]

The non-recurring charges ("NRCs") for special access channel terminations also are exorbitantly higher than those charges for UNE DS1 loops, with charges in Texas,

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Qwest's special access NRCs in Arizona and Colorado are 75-85% higher than the UNE NRCs and apply even when a customer commits to a 3-year term.[46]

Rate comparisons for DS1 dedicated transport UNEs and special access channel mileage show similar, if not more extreme, disparities between UNE rates and both price caps and Phase II pricing flexibility rates for special access. At the outset, special access rates for channel mileage and UNE rates for DS1 transport include at least two rate elements: the fixed monthly rate and the mileage rate which varies according to the length of the circuit. The fixed month-to-month recurring Phase II rates for most of the areas analyzed are over 100% percent higher than for the comparable UNE services, with both price cap rates and Phase II rates over 400% higher than the UNE rates in Illinois.[47] The greatest disparity is in mileage rates, where the special access rates in some instances over 10,000% higher than the comparable UNE rate in the state. For example, in Texas the UNE fixed monthly and mileage rates are $33.76 and $0.1005, respectively; the price cap fixed monthly and mileage rates are $62.00 and $15.50; and the Phase II fixed

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Similar to the loop data, one would expect that, even if the month-to-month transport rates remained somewhat higher, there would be a dramatic reduction in rates when customers commit to longer terms. As with the loop rates, however, even the longer-term transport rates remain supra-competitive and well above the cost-based UNE rates. For RBOCs that offer a 1-year term discount – Verizon does not – the price cap and Phase II fixed rates for transport are 43-292% and 79-350% higher than UNE rates, respectively.[50] The rates for a 3-year term are not dramatically better and are still over 100% percent higher than UNE rates in some states.[51] In several Verizon states, for example, where the fixed recurring monthly rates for its month-to-month and 3-year plan are actually lower than the comparable UNE fixed rate, the excessive mileage charges that are 371-4,462% above cost allow Verizon to recover its costs and still effectively [illegible] months.[54] Additional conditions were imposed as part of the 2006 merger of AT&T with BellSouth. These conditions, while marginally helpful, are not truly beneficial for consumers and competitors. First, these conditions are limited in time. Second, they address competitive harms arising from the mergers and not the basic problem of market power in the special access markets. Rates that were already unjust and unreasonable.

this proceeding to assess the tenuous state of competition in the special access market. Because competitive forces are inadequate to constrain the ILECs' monopoly behavior, the Commission should rescind Phase II pricing flexibility and impose reasonable regulated rates.

D. Despite Above-Cost Rates in MSAs Where ILECs Have Been Granted Phase II Pricing Flexibility, Widespread Competitive Entry Has Not Occurred and Few Competitive Alternatives Exist to Discipline Special Access Rates to a Competitive Level.

A key reason that the ILECs are able to sustain supra-competitive rates for special access is because of the lack of facilities-based competitive alternatives. As explained in the attached Declaration of Ajay Govil, XO's Director of Transport Technology and Network Architecture, there are multiple reasons for this scarcity. First, it remains inefficient for most CLECs to build high-capacity loop facilities themselves.[57] Second, interconnecting with the few competitive access providers ("CAPs") that do exist provides little in the way of economic benefit.[58] Finally, no other technology has yet developed as a widely available wireline loop substitute.[59]

Except in rare instances, it is uneconomic for CLECs to build their own high-

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generally priced significantly less than ILEC special access and can be a very attractive option for CLECs.[65]

Unfortunately, the vast majority of competitive access providers must make use of

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The failure of intermodal platforms to develop into widely available substitutes for ILEC special access, even with special access priced so far above cost, has also helped the ILECs maintain their stranglehold on last-mile service.[69] Although fixed

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E. The Terms and Conditions of ILEC Price-Flexibility Tariffs and Contracts Are Onerous and Exclusionary

The Commission also has recognized that market power can be exercised through exclusionary conduct as evidenced by onerous terms and conditions in a LEC's tariff offerings.[72] Because special access services are characterized by economies of scale and significant sunk costs, with impediments such as rights-of-way and building access, market entry by competitive providers has been limited and generally concentrated in the highest capacity services in the densest metropolitan areas.[73] Additional barriers to entry other than these economic and operational impediments may be imposed unreasonably by the ILECs to prevent competition in both the wholesale and retail markets for these [redacted] above, the ILECs have the market power to succeed with anti-competitive behavior and have strong incentives to use exclusionary pricing to prevent entry and expansion of the [redacted] little choice other than to purchase from the highest base month-to-month special access rates.

Additionally, AT&T's special access tariff offerings and discount plans are administered at the regional level based on AT&T's legacy companies (Pacific Telesis [redacted] because the customer must pay some of the remaining months at the full monthly rate even if the circuit is disconnected well before the end of the first year. For example, under Qwest's Regional Commitment Plan ("RCP"), if a customer terminates service

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imposed by a firm with market power which requires payment of the full amount (or a large percentage) of the contract through the entire term of the contract even after it has terminated service, however, is punitive in nature, and is not based on cost recovery. Since even the discounted special access rates greatly exceed cost-based rates for comparable UNEs, such a penalty implies the RBOCs have more nefarious purposes: to drive up the wholesale costs of its competitors and to lock-in its customers so they are unable purchase circuits from a competitor.[83] Because of the short supply of competitive would lose discounts it had obtained from AT&T on other services.[85] For example, in order to obtain discounts under AT&T's Managed Value Plan for both for its legacy Ameritech and Southwestern Bell regions ("MVP"), competitors must not only commit to minimum annual revenue requirements ("MARCs") of $10 million in each region, but they must also maintain an Access Service Ratio of 95% or greater, meaning that no more than 5% of a competitor's monthly billing with AT&T may be for UNEs, including DS1 and DS3 UNE loops, and DS1, DS3 and dark fiber UNE transport.[86]

Volume and growth requirements, coupled with termination penalties, of AT&T's

[redacted]

months' discounts, if the contract is cancelled.[88] AT&T's MVP tariff fits the pattern of an exclusionary contract by tying the offered discounts to maintaining traffic on AT&T's network, and creates a very large hurdle for competitors to overcome.[89] "These provisions, and others like them in the various term and volume discount plans offered by the ILECs, artificially increase a customer's cost of switching, and raise competitors' costs of acquiring customers.

Verizon also has offered a promotion in connection with its UNE forbearance petitions that required competitors' high-capacity UNEs to be converted to special access in order to qualify for lower special access pricing.[90] For companies that rely extensively [redacted] commitment.[91] After committing to 3-year or 5-year terms, competitors are prevented during that time from converting their high-priced ILEC special access services to lower-cost alternatives from other vendors or via self provisioning without incurring significant termination penalties. By targeting the growth market where competition or entry would be most likely, the ILECs can prevent the development of a more facilities-based competition.[92]

Even a one-year term commitment in the hands of the RBOCs may be anti-competitive. In a situation where no UNE facilities are readily available, a competitor [redacted] those costs.[94] By inducing enough buyers to sign long-term, high volume or growth contracts, the ILEC can tie up enough customers and volume such that there is insufficient demand available for competitors to enter the market and operate profitably.[95]

More generally, the ILECs also continue to attempt to constrain competitors' abilities and rights to challenge the excessive special access rates and charges imposed upon them. When additional charges, such as those for special construction, are required they are often are not adequately explained or detailed. Some ILEC discount plans restrict a competitor's ability to dispute charges or prevent any disputed charges to count toward minimum commitments even if the competitor later pays the charges.[96] Other plans attempt to restrict competitors' rights to seek regulatory recourse by forbidding them from participating in regulatory proceedings that condemn the ILEC's excessive special access rates.

In the special access market, both supply responsiveness and demand responsiveness are low, allowing the LECs to hold onto market power and exercise it at will. Supply responsiveness measures whether competitors enter the market with enough capacity to supply competing services when a LEC increases rates for special access. Demand responsiveness measures whether consumers have the ability to make a switch to a competitor if such an alternative exists. As discussed above, there are very few alternative carrier, even if one exists. Thus, because drastically above-cost ILEC rates have not induced competitive entry and the largest competitors in the market have exited due to mergers with the ILECs, there is not nearly enough competition to discipline the rates, terms and conditions of ILEC special access services.

IV. RECENT REGULATORY DEVELOPMENTS DRIVE DEMAND FOR INCUMBENT LEC SPECIAL ACCESS, IRRESPECTIVE OF COSTS

Since the initial filing of comments and reply comments in this proceeding, changes within the industry have stalled competition within the market for special access services, and at the same time, have eliminated loop and dedicated transport facilities and services that CLECs tend to use as special access service substitutes. In only two years, the industry witnessed the simultaneous mergers of dominant special access service providers, Verizon and SBC, each with their biggest in-region competitor, MCI and AT&T. Subsequently, the new "AT&T" swallowed BellSouth, thereby narrowing competition within the market for special access services within nine additional states. Importantly, as the selection of special access service providers has become smaller, so has the selection of substitute services. In particular, the Commission's most recent rule changes, limiting the high-capacity loop and dedicated transport UNEs available to competitors, have only increased the ILEC's market power for special access services.

A. Recent Mergers Have Eliminated the Two Largest Competitive Providers of Special Access Services

Since the initial filing of comments in this proceeding, the Commission has approved three RBOC mergers, resulting in substantial, industry-wide impact. In November 2005, the Commission approved the mergers of Verizon and MCI, and of SBC

competing providers.[101] The conditions ordered by the Commission for each individual merger provide only short-term and ultimately inadequate protections against the RBOCs' demonstrated exclusionary and discriminatory inclinations and practices, and are simply insufficient to ensure that robust competition in the market for special access services will develop and be sustained.

Notably, the RBOC mergers of the past two years each were approved by the Commission notwithstanding record evidence that: (1) the mergers would eliminate the most significant source of actual and potential competition for special access services within each of the RBOC and affiliated ILEC operating territories;[102] (2) high barriers to entering the market for special access services would foreclose future competition;[103] and (3) RBOC consolidation in the markets for special access services would provide the

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101 Comments of Cbeyond *et al.*, WC Docket No. 06-74, at 88-90 (filed Jun. 5, 2006); Petition to Deny of CompTel, WC Docket No. 06-74, at 11-12 (filed Jun. 5, 2006); Petition to Deny of Earthlink, Inc., WC Docket No. 06-74, at 21-27 (filed Jun. 5, 2006); Comments of Sprint Nextel Corporation, WC Docket No. 06-74, at 6-9 (filed Jun. 5, 2006); Petition to Deny of Time Warner Telecom, WC Docket No. 06-74, at 32-49 (filed Jun. 5, 2006).

102 A report submitted by XO Communications in the Verizon/MCI and SBC/AT&T merger proceedings before the Commission shows that MCI's market share of 10% of Wholesale Metro Private Lines, over all metropolitan areas, ranked first outside of the RBOCs. Following the merger of Verizon and MCI, the market share of Wholesale Metro Private Lines owned by Verizon increased from 74% to 84%. The same study reflects that AT&T's market share of 9% of Wholesale Metro Private Lines, over all metropolitan areas, ranked second outside of the

RBOCs with increased opportunities and incentives to raise special access rates farther above cost, and to engage in practices that would harm special access competition.[104] The remedies adopted by the Commission are not sufficient to redress the adverse impact of those mergers on the offering of special access services. As demonstrated by the evidence provided herein, they already have proven, to a significant degree ineffective.[105] The Commission therefore should recognize their limited value and adopt regulations that discipline special access rates in the absence of real competition, and permit competition to thrive.[106]

As an indication of the weakness of the merger condition limiting special access price increases, record evidence before the United States Court for the District of Columbia, in the Tunney Act review proceeding demonstrates that, as the result of those mergers, unreasonable price increases for special access services occurred.[107]

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104 *See supra* n. 101.

105 *See infra* n. 107. The record before the United States District Court for the District

Specifically, by eliminating key lower-priced providers of competing special access services (AT&T and MCI), downward pressure on the pricing of special access services by SBC and Verizon, pre-merger, was relieved,[108] and pricing that was showing signs of decline "stabilized."[109] Moreover, the acquiring companies (Verizon and the "new" AT&T), having been freed from competition, implemented direct increases to DS1 and

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practices by SBC, even prior to consummating its proposed merger with legacy AT&T.[113]

For example, in re-negotiating its contract-based special access service arrangements, [redacted] demand, the incumbent can therefore 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."[118] Because subscribers face high termination penalties when volume commitments are not reached, those costs are far greater than any saving recouped through cheaper special access services from non-ILEC providers.[119]

Since the initial filing of comments and reply comments in this proceeding, the mergers of Verizon and MCI, SBC and AT&T, and the "new" AT&T and BellSouth, have all resulted in the national market for special access services being dominated by two RBOCs: AT&T and Verizon. The duopoly that recently has emerged brings with it the danger of collusion between the "new" AT&T and Verizon. In prior merger review proceedings, the Commission determined that the risk of collusion is greatest where the number of ILECs is reduced and high market barriers exist.[120] Importantly, the Commission also determined that mergers resulting in duopoly (or monopoly) tend to harm the public interest, and therefore warrant strong presumptions of illegality under existing antitrust doctrines.[121] At bottom, the Commission must reconsider its regulation of special access pricing in light of the dramatically changed, post-merger market conditions.

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118 *Id.*

119 *Id.*

120 *Id.* at 14 (citing SBC/Ameritech Merger Order ¶ 104).

121 *Id.* at 16 (citing *Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20559 ¶ 103 (2002).

B. Decreased Availability of UNEs Leads to Increased Market Power in the Provision of Special Access

Section 251 of the 1996 Act obligates ILECs to unbundle loop and dedicated transport network elements, and to offer such network elements subject to the terms and conditions of state commission approved interconnection agreements, at cost-based rates.[122] Furthermore, Section 271 of the 1996 Act obligates the RBOCs to unbundle loop and dedicated transport network elements, and to offer such network elements at rates, and subject to terms that are just and reasonable.[123] Those high-capacity (DS1 and DS3 capacity) loop and dedicated transport network elements offered pursuant to Section 251 and, to a very limited extent, Section 271, enable CLECs to deploy economically facilities-based networks in competition with the ILECs. In contrast, special access

1. High Capacity Loops and Dedicated Transport Facilities

Since the initial filing of comments and reply comments in this proceeding, carriers have, in large part, implemented the Commission's *TRRO* and numerous state commissions have issued decisions interpreting it. Per the *TRRO,* ILECs are no longer obligated to provide certain high-capacity (DS1 and DS3) loop and dedicated transport UNEs in wire centers or on routes that meet or exceed the non-impairment thresholds established by the Commission.[124] The initial transition period for high-capacity loop and dedicated transport UNEs deemed "non-impaired" by the ILECs on the effective date of the *TRRO* expired on March 11, 2006.[125] Those UNEs subject to the initial transition period, with rare exception, already have been converted or are slated to be converted to unreasonably priced special access services or, in rare instances, services provided over other competitive facilities.[126] Importantly, effective March 11, 2005, the ILECs also are no longer obligated to unbundle dedicated transport UNEs that do not connect ILEC wire centers (*i.e.,* entrance facilities).[127]

In combination, these new Commission rules ending access to UNEs have resulted in the loss of critical inputs by facilities-based competitors to ILECs, thereby increasing the incumbents' market power in the provision of special access services.***

V. THE COMMISSION SHOULD REVOKE PHASE II PRICING FLEXIBILITY, REINITIALIZE RATES, AND BAN THE USE OF EXCLUSIONARY OR ANTI-COMPETITIVE TERMS AND CONDITIONS

124 47 C.F.R. §§ 51.319(a)(4)(i); 51.319(a)(5)(i); 51.319(e)(2)(ii)(A); 51.319(e)(2)(iii)(A).

125 47 C.F.R. §§ 51.319(a)(4)(iii); 51.319(a)(5)(iii); 51.319(e)(2)(ii)(C); 51.319(e)(2)(iii)(C).

126 Covad *Clancy Decl.* ¶ 6; XO *Koppersmith Decl.* ¶ 9.

127 47 C.F.R. § 51.319(e)(2)(i).

In enacting the first component of the remedy proposed by Joint Commenters, the Commission should begin by reinitializing ILEC tariffed special access price caps at an 11.25% rate of return. The Commission should also adopt an X-factor, which would require the ILECs to reduce their rates by a certain percentage each year, thereby requiring the ILECs to share their productivity gains with their customers. More specifically, the Commission should adopt, at least on an interim basis subject to further review, a 5.3% X-factor in order to ensure that the ILECs' special access rates are established at reasonable levels.[130] Indeed, some commenters have felt that an 11.25% rate of return and a 5.3% X-factor is overly generous toward the ILECs.[131]

Additionally, once existing rate levels for special access have been reinitialized and the X-factor set, the Commission could grant downward pricing flexibility across all access markets. Downward pricing flexibility would allow the ILECs to reduce prices in [redacted]

With respect to the second component of the relief proposed by the Joint Commenters, the elimination of exclusionary and anti-competitive terms and conditions would do much to help ensure an open and fair marketplace for special access services. Currently, numerous ILECs tie special access pricing to very high term and volume commitments with excessive termination penalties. Such preferences can unfairly favor larger service providers over smaller service providers and, in so doing, can stifle competition. Similarly, the Commission should forbid the ILECs from entering into contracts that require a service provider to convert all or a percentage of its UNEs to special access services, to guarantee a certain percentage of "spend" on special access, or to agree only to purchase special access services in the future. Finally, the ILECs' new trend toward presenting discounted offerings to customers who agree not to oppose ILEC interests in Commission proceedings is not only anti-competitive, it is contrary to public [redacted] permissible charge by the ILEC and to remove any illegal terms or conditions. In this case, a fresh look period is clearly warranted by the market distortions that have occurred since deregulation of the special access market began. The exorbitant rates charged and anti-competitive terms imposed by ILECs must be corrected as soon as possible in order to ensure that competitive telecommunications options will still be available to individual consumers as well as to small- and medium-sized businesses.

The Commission is authorized to order fresh look provisions in connection with changes to its special access pricing regulations.[134] Importantly, the Commission has recognized that the "existence of long-term access arrangements... raises potential anti-competitive concerns since they tend to 'lock up' the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment."[135] Therefore, the Commission has adopted fresh look provisions in the context of prior changes to its special access pricing regulations, where such provisions would serve the public interest, and would eliminate ongoing use of special access prices

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134 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order, 11 FCC Rcd 15499, ¶ 1095 (1996). In the *Local Competition Order*, the Commission declared that it has "ample authority under Section 4(i) of the 1934 Act as well as Section 251 of the 1996 Act, to order this remedy," and that "[c]ourts have held that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful . . . and to modify other provisions of private contracts when necessary to serve the public interest." *Id.* (quoting *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987)).

135 *Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion & Order, 7 FCC Rcd 7369, ¶ 201 (1992), *recon.* 8 FCC Rcd 7341, 7342-59 (1993) (fresh look to enable customers to take advantage of new competitive opportunities for special access under expanded interconnection), *vacated on other grounds and remanded for further proceedings sub nom. Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (1994). *See Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion & Order, 9 FCC Rcd 5154 (1994).

that the Commission determined to be unlawful.[136] To the extent that the Commission adopts new or modified special access pricing regulations in this proceeding, the Commission also should adopt fresh look provisions to ensure that such regulations will benefit all customers.

CONCLUSION

The Commission should expeditiously act to modify existing regulations governing ILEC special access pricing flexibility in the manner described herein.

Respectfully submitted,

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136 *See id.*