

WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
Washington, DC 20006

Tel: 202 303 1000
Fax: 202 303 2000

DOCKET FILE COPY ORIGINAL

August 8, 2007

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

FILED/ACCEPTED

AUG - 8 2007

Federal Communications Commission
Office of the Secretary

Re: In the Matter of Special Access Rates for Price Cap Local Exchange Carriers,
WC Docket No. 05-25

Dear Ms. Dortch:

On behalf of Time Warner Telecom Inc., and One Communications Corp. please find enclosed two copies of a Redacted Confidential version of comments filed today in the above referenced docket. Pursuant to the protective order in this proceeding, two copies of a confidential version of these comments have been filed with Margaret Dailey or Pamela Arluk and one copy of a confidential version of these comments has been filed with the Secretary. A Redacted Confidential version has also been filed electronically on ECFS.

Please let us know if you have any questions with respect to this submission.

Respectfully submitted,

Thomas Jones
Jonathan Lechter

WILLKIE FARR & GALLAGHER LLP
ATTORNEYS FOR TIME WARNER TELECOM INC.
AND ONE COMMUNICATIONS

cc: Margaret Dailey, Pamela Arluk

No. of Copies rec'd 041
List ABCDE

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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)
Regulation of Incumbent Local Exchange Carrier) RM-10593
Rates for Interstate Special Access Services)
)

FILED/ACCEPTED
AUG - 8 2007
Federal Communications Commission
Office of the Secretary

COMMENTS OF TIME WARNER TELECOM AND ONE COMMUNICATIONS

Willkie Farr & Gallagher LLP
1875 K Street, N.W.,
Washington, D.C. 20006
(202) 303-1000

ATTORNEYS FOR TIME WARNER
TELECOM AND ONE
COMMUNICATIONS

August 8, 2007

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY	1
II. ILECS RETAIN OVERWHELMING MARKET POWER OVER THE LOCAL TRANSMISSION FACILITIES NEEDED TO PROVIDE SPECIAL ACCESS.....	5
A. All Relevant Government Agencies Have Found That ILECs Retain Market Power Over Local Transmission Facilities.....	6
B. Data Provided By Carriers In FCC Proceedings Supports The Conclusion That The ILECs Retain Overwhelming Market Power Over Local Transmission Facilities	9
C. TWTC And One Communications Remain Heavily Reliant On ILEC Loop Facilities And Can Only Construct Loops In A Limited Number Of Locations.....	11
D. Competitors’ Reliance On ILEC Local Transmission Facilities Is Increasing	12
E. Neither Cable Modem Service, Nor Wireless Broadband, Nor Satellite Service Constitutes a Viable Substitute For Special Access Service.....	14
III. THE FCC’S SPECIAL ACCESS RATE REGULATIONS ARE FATALLY FLAWED.....	18
A. The FCC’s Special Access Pricing Flexibility Triggers Are Incoherent.....	18
B. In Adopting The Special Access Pricing Flexibility Triggers, The Commission Relied On Assumptions That Have Since Been Disproven.....	21
C. The Commission’s Price Cap Regime For Special Access Is Flawed	24
D. The Commission Has Failed To Regulate ILEC Rates For Ethernet Service.....	26
IV. ILECS HAVE USED THEIR MARKET POWER AND FREEDOM FROM REGULATION TO SET SPECIAL ACCESS RATES AT SUPRACOMPETITIVE LEVELS.....	28

TABLE OF CONTENTS
(CONTINUED)

	<u>Page</u>
A. ILEC Prices For Special Access Are Higher In Phase II MSAs Than In MSAs That Remain Subject To Price Caps	29
B. ILEC Discounted Prices Are At Least 2-3 Times Higher Than Prices Charged By Competitive Wholesale Providers Of Special Access Service.....	31
1. DS1 and DS3 Pricing	32
C. ILEC Pricing Practices In Long Haul Markets Illustrate Their Pricing Practices In Competitive Markets.	33
D. The ILECs' Reliance On Prices Per Voice Grade Equivalent Is Unpersuasive.	34
V. HIGH ILEC SPECIAL ACCESS PRICES HARM CONSUMER WELFARE BY REDUCING THE SIZE OF COMPETITORS' ADDRESSABLE MARKETS.....	35
VI. THE ILECS HAVE ENGAGED IN EXCLUSIONARY PRICING PRACTICES TO PREVENT WHOLESALE COMPETITION IN THE PROVISION OF SPECIAL ACCESS FROM DEVELOPING.....	36
A. ILEC Standard And Overlay Discount Offers Lock In CLEC Demand	37
B. ILEC Standard Discounts Have Similar Anticompetitive Effects.....	40
C. The AT&T/BellSouth Merger Conditions Have Not Prevented AT&T from Acting in a Discriminatory Fashion	42
VII. THE COMMISSION SHOULD IMMEDIATELY ADOPT REGULATIONS THAT WILL DIMINISH THE ILECS' OPPORTUNITIES TO ABUSE THEIR MARKET POWER IN THE PROVISION OF SPECIAL ACCESS	42
VIII. Conclusion	50

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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 Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593

COMMENTS OF TIME WARNER TELECOM AND ONE COMMUNICATIONS

Time Warner Telecom Inc. (“TWTC”) and One Communications (“One Communications”), by their attorneys, hereby file comments in response to the public notice¹ in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

It has now been almost five years since AT&T filed its petition for rulemaking to reform special access regulation, more than two and a half years since the Commission released its Notice of Proposed Rulemaking seeking comments on how it should regulate special access in the future, and more than two years since the end of the CALLS plan regulatory regime for special access. Time continues to pass, but three facts remain constant: (1) the ILECs continue to control the only viable local transmission facility serving at least 90 percent of the commercial buildings in the country; (2) the FCC’s regulatory framework for special access gives the ILECs virtually a free hand to exploit their control over bottleneck facilities; and (3) the ILECs are doing so by charging

¹ See *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, Public Notice, FCC 07-123 (rel. Jul. 7, 2007) (“*Public Notice*”).

outrageously high prices and by engaging in exclusionary pricing practices to prevent wholesale competition from developing. No amount of "refreshing the record" in this proceeding will change these facts. They require that the Commission act now to mandate lower ILEC special access prices and to prohibit ILECs from engaging in exclusionary pricing.

There is more and more evidence that the ILECs have a monopoly over transmission facilities serving the "vast majority" (as the Justice Department put it) of commercial buildings in the United States. This is the conclusion reached by the GAO in its study of the special access market, by the Justice Department in its review of the Bell/IXC mergers and even by the FCC in the *TRRO* proceeding. This conclusion is consistent with all of the data provided in this and other proceedings by ILECs and competitors alike. It also comports with the market realities that TWTC and One Communications face. For example, TWTC deploys its own loops more aggressively and extensively than any other competitor, but it relies on ILECs to connect to the vast majority of its customer locations. One Communications, which generally serves smaller businesses than TWTC, has no choice but to rely on ILECs for virtually every one of its end user connections. There is also no basis for concluding that intermodal competitors - cable, fixed wireless or satellite -- provide any material downstream competition for ILEC special access services.

Moreover, there is no disputing the fact that the current regulatory framework for special access is fundamentally flawed. The pricing flexibility triggers eliminate price cap regulation throughout an MSA based on indications of entry in a small subpart of the MSA, eliminate price cap regulation for DS1 and DS3 service without proof that

competitors provide those services, and eliminate price cap regulation of ILEC special access loops throughout an MSA without proof that a single competitor has deployed a single loop facility anywhere in the MSA. The FCC itself has concluded that the pricing flexibility triggers “provide[] little indication that competitors have self-deployed alternative facilities” in the areas in which the ILECs are obtain pricing flexibility. But even ILEC special access services that remain subject to price caps are not effectively regulated since the FCC has freed the ILECs’ special access basket price cap index from any X-Factor reductions since mid-2004 and has allowed ILECs to offer volume and term discounts without any effective constraints on exclusionary pricing.

Unsurprisingly, the ILECs continue to exploit the absence of effective special access regulation to harm consumer welfare and competition in obvious and pernicious ways. The ILECs continue to charge extraordinarily high prices for special access services of all kinds. As explained more fully in these comments, even the most discounted prices ILECs charge for special access in MSAs freed from price cap regulation (“Phase II” areas) are consistently and significantly higher than ILEC special access prices charged in areas subject price caps. Moreover, even the most discounted ILEC special access prices in areas subject to price caps are consistently and significantly higher than prices charged by competitors in the few areas in which competitors offer service. ILEC prices for DS1 and DS3 mileage and for Ethernet cross-connects are the most egregious, and represent blatant examples monopoly pricing.

In addition, the ILECs continue to engage in exclusionary pricing to prevent wholesale competitors like TWTC from gaining market share and from expanding their network footprint to serve other carriers. The ILECs do this by conditioning the

availability of discounts off of their absurdly high month-to-month special access rates on customers' agreement to provisions that have the effect of locking up a customer's demand with the ILEC. As part of these agreements, ILECs require that customers agree to onerous penalties for failure to meet their commitments under these lock-up agreement. Customers wishing to purchase service from a competitive wholesaler risk failing to meet their volume commitments under the lock up agreements. No competitor can offer a steep enough discount in its limited network footprint to make this risk worth taking for a customer.

All of this evidence leads to the conclusion that the Commission must act now to limit the ILECs' opportunities to use their control over local transmission facilities serving business and carrier customers to harm consumer welfare and competition. *First*, it must mandate that ILECs lower their special access prices. There are many ways in which this could be accomplished, but the most practical approach is to (1) eliminate Phase II pricing flexibility; (2) require inclusion of all DS1, DS3, OCn and Ethernet services in the special access price cap basket; (3) re-initialize the level of the price cap index for the basket at the level that would have applied had the FCC continued to apply the 6.5 percent X-Factor from July 1, 2001 to the present and continue to apply that X-Factor in future years; (4) mandate reduction of ILEC Ethernet cross-connect prices by 50 percent; and (5) allow ILECs the right to substitute the price yielded by these reforms with prices set based on forward-looking cost studies.

Second, the Commission must stop the ILECs from engaging in exclusionary pricing. It should do so by prohibiting ILECs from conditioning the availability of any discount off of standard tariffed pricing for any kind of special access (TDM, OCn or

packetized) on a commitment that is not reasonably related to the efficiencies yielded by the volume or term commitment that is at issue. In addition, the Commission should declare that certain types of conditions that have the effect of locking up the market and preventing wholesale competition from developing are *per se* unlawful under this regulation, and should provide a list of such unlawful conditions.

Third, in order to allow purchasers and competitive wholesale providers of special access to take advantage of the new terms mandated by these reforms, the Commission should mandate that the ILECs grant all customers subject to existing special access contracts or volume/term commitments a “fresh look” right (one such election right per arrangement) to terminate any existing special access purchasing arrangement without the application of an early termination penalty within one year of the effective date of this rule. Absent this requirement, special access purchasers who are tied up in multi-year term commitments could well be forced to continue to pay unreasonable prices or abide by unreasonable terms and conditions for years after the adoption of the reforms described herein.

II. ILECS RETAIN OVERWHELMING MARKET POWER OVER THE LOCAL TRANSMISSION FACILITIES NEEDED TO PROVIDE SPECIAL ACCESS.

Special access services are provided via local transmission facilities. A firm that controls the only local transmission facilities over which special access services can be provided has the ability to dominate the special access market by unilaterally increasing prices and by raising its rivals' costs. The extent to which the ILECs control bottleneck local transmission facilities is therefore critical to the question of whether and to what extent the Commission should regulate ILEC special access services. As explained herein, all of the available evidence supports the conclusion that, for the overwhelming

majority of commercial buildings in the country, the ILECs control the only viable local transmission facility.

A. All Relevant Government Agencies Have Found That ILECs Retain Market Power Over Local Transmission Facilities

Virtually every federal government agency with relevant expertise has now examined the competitiveness of the local transmission (loop and transport) market. Every one of these agencies has reached the same conclusion: ILECs retain overwhelming market power over the upstream loop and transport inputs needed to serve small, medium and large business customers. Importantly, every one of these studies accounted for the presence of cable, wireless and other intermodal competitors. By any definition, the ILECs therefore continue to dominate the local transmission market.

For example, the Government Accountability Office (“GAO”) determined that, based on data from GeoResults and Telcordia, competitors have deployed transmission facilities to less than 6 percent of the buildings demanding at least DS-1 level service in the 16 urban markets studied.² Of course, outside of these urban markets, competitive deployment is likely even lower. The GAO found that nearly all of the loops that competitors have deployed are well above the DS-1 level of capacity. Competitive entry at low circuit capacities is unlikely according to the GAO. In light of long-standing entry barriers, the GAO concluded that “wireline facilities-based competition itself *may not be*

² See GAO, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 22 (Washington, D.C., Nov. 2006) (“GAO Report”). The GAO acknowledged that GeoResults data could overcount or undercount the number of buildings served by CLECs and one “price-cap incumbent” suggested that GAO may undercounting by as much as 30 percent. Even if this were the case, it concluded that “competitive alternatives exist in a relatively small subset of buildings.” *Id.*

a realistic goal for some segments of the market for dedicated access... Where demand for dedicated access is less than 3 or 4 DS-1's, it would appear unlikely that any competitor would extend its network for that business." *GAO Report* at 42 (emphasis added). The report showed that most of the loops deployed by competitors provide 2 DS-3s or higher of capacity, but the ILECs remain dominant even in that submarket. *See id.* at 20. The GAO emphasized that its study *accounted for both intramodal and intermodal competition* (including cable companies and wireless). *See id.* at 47.

The Justice Department also conducted an independent review of the market for high capacity local transmission facilities needed to serve businesses in the Verizon and SBC territories in connection with its review of Verizon/MCI and SBC/AT&T mergers. The Department concluded that Verizon and SBC controlled the only last-mile access to the "vast majority of commercial buildings in its territory,"³ and that high fixed and sunk costs make deployment of competitors' facilities "difficult, time consuming and expensive..." *DOJ Complaint* ¶ 27. Given its careful methodology in conducting market review of this sort, it is virtually certain that the Department considered all types of competition, including intermodal, cable and wireless.⁴

³ *United States v. Verizon Communications, Inc. and MCI Inc.*, Case No. 1:05CV02103, Complaint ¶ 15 (D.D.C. filed Oct. 27, 2005) ("*DOJ Complaint*"); *GAO Report* at 25 ("However, DOJ found [in its review of the Bell/IXC mergers] that, for the vast majority of buildings in the MSAs it reviewed, no competitive providers of dedicated access facilities existed, which is consistent with the data in table 2.").

⁴ In the past, ILECs have made much of language in the FCC's Bell/IXC orders which they allege represents the FCC's conclusion that the special access market is competitive. *See e.g.*, Petition for Forbearance of the Verizon Telephone Companies For Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area, WC Dkt. No. 06-172 at 17 (filed Sept. 6, 2006) ("*Verizon New York MSA Petition*"). But the FCC's job in scrutinizing these mergers was to determine the extent to which the *merger* would reduce competition in the wholesale and retail special access markets. The FCC never

The FCC reached similar conclusions in the *TRO*. There, the Commission found that competitors serve only 3-5 percent of the commercial buildings nationwide.⁵ Moreover, the FCC found that it is not “economic” or “possible” for a reasonably efficient competitor to construct DS-0 loops anywhere in the country or DS-1 or even single DS-3 loops in the vast majority of wire centers in the country.⁶

As the GAO and DOJ studies demonstrate, the conclusions reached by the FCC in the *TRO* are valid today. If anything, the number of loop facilities deployed by competitive carriers may have actually decreased substantially in the last few years as a result of the Bell/IXC mergers. Legacy AT&T and MCI had together deployed over 10,000 loop facilities.⁷ Thousands of these facilities were “in-region” to the acquiring BOC but were not subject to divestiture. Verizon and AT&T therefore absorbed these facilities into their ILEC operations post-merger.⁸ It comes as no surprise, therefore, that

reached any conclusions regarding the level of competition in the market for local transmission facilities needed to provide special access or the level of competition in the wholesale special access market. Those questions were not before Commission in the Bell/IXC merger proceedings.

⁵ See *Review of the Section 251 Unbundling Obligations of Local Exchange Carriers, et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 298 n.856 (2003), *subsequent history omitted* (“*TRO*”) (stating that both “competitive LECs and incumbent LECs report that approximately 30,000, *i.e.*, between 3% to 5%, of the nation’s commercial office buildings are served by competitor-owned fiber loops”).

⁶ See *Unbundled Access to Network Elements, et al.*, Order on Remand, 20 FCC Rcd 2533, ¶¶ 149, 166 (2005) (“*TRRO*”).

⁷ Reply Comments of WilTel Communications, LLC, WC Dkt. No. 05-25, RM-10593, at 3 (July 29, 2005) (“*WilTel Reply*”).

⁸ The DOJ ordered divestitures of only several hundred of these facilities. See *Complaint* ¶ 3.

the GAO has concluded that the level of competition may have declined in many MSAs recently.⁹

B. Data Provided By Carriers In FCC Proceedings Supports The Conclusion That The ILECs Retain Overwhelming Market Power Over Local Transmission Facilities

The data submitted in FCC proceedings by both competitors and ILECs support the conclusions reached by the GAO, DOJ and FCC. For example, using its own database, Wiltel has estimated that competitors have “deployed special access facilities to approximately 25,000 commercial buildings nationwide.” *Wiltel Reply* at 3. Sprint came to a similar conclusion, asserting that, of the 3 million buildings demanding special access service, only 22,000 were served by CLECs.¹⁰

The RBOCs’ own data confirm these conclusions. Two years ago, Verizon asserted that competitors had deployed loops serving “31,467+” buildings.¹¹ Verizon indicated that, back in 1996, there were only 24,000 buildings “served directly by CLEC fiber.”¹² In other words, in nearly 10 years, competitors added connections to less than

⁹ See *GAO Report* at 42 (“Even more troublesome is the fact that some of our analysis, which is based on FCC’s competition metrics, suggests that competitive alternatives for dedicated access have declined in some MSAs in the past few years.”).

¹⁰ See *In re Broadband Connectivity Competition Policy Workshop - Comment, Project No. V070000*, Letter from Robert S. Foosaner, SVP -Government Affairs, Sprint/Nextel, to FTC, Office of the Secretary, at n.4 (Feb. 28, 2007), attached to *Ex Parte* Letter of Anna M. Gomez, VP - Government Affairs, Sprint/Nextel, to Marlene H. Dortch, Secretary, FCC (filed Mar. 21, 2007).

¹¹ Verizon Comments, WC Dkt. No. 05-25, Attach. D, Declaration of Quintin Lew, at App. B (June 13, 2005).

¹² Verizon Comments, WC Dkt. No. 05-25, Attach. C, Declaration of William E. Taylor, at Table 10 (June 13, 2005).

8,000 buildings. This limited growth only underscores the substantial barriers to deployment of local transmission facilities.

Similarly, in the AT&T/BellSouth merger proceeding, the Applicants argued that there were 219,000 commercial buildings demanding enterprise class services in BellSouth's territory.¹³ Yet, in the *Triennial Review Remand* proceeding less than three years ago, BellSouth stated that CLEC fiber loops served only approximately 2,200 buildings in all of BellSouth's service area or 1 percent of the market.¹⁴

Not surprisingly, competitive carriers have explained in detail that they rely on ILEC facilities in the vast majority of circumstances. Sprint/Nextel and T-Mobile rely on DS-1 facilities to connect their wireless towers to mobile switching stations. They must rely on ILEC facilities 95¹⁵ and 96 percent of the time respectively.¹⁶ Even legacy AT&T and MCI, each of which had some of the highest number of on-net buildings of any

¹³ See *SBC Communications, Inc. and AT&T Corp. Application for Transfer of Control*, Reply Declaration of Dennis W. Carlton & Hal S. Sider, WC Dkt. No. 05-65, ¶ 22 (filed May 10, 2005).

¹⁴ See BellSouth Presentation, "Lessons Learned in State TRO Proceedings," attached to *Ex Parte* Letter of Glenn T. Reynolds, Vice President, Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-338, at 4 (Aug. 18, 2004) ("In BellSouth's region: More than 2,200 buildings are served by non-ILEC fiber."). Professor Lee Selwyn asserted that the data submitted by BellSouth in this proceeding shows that "BellSouth control[s] 97.7% of special access tail circuits in its region." WilTel Reply at 7 (*citing* to the Reply Declaration of Lee Selwyn, appended to WilTel Reply as Ex. 7 (*Selwyn Declaration*)).

¹⁵ See Comments of Sprint, WC Dkt. No. 05-25, RM-10593, at 7 (June 13, 2005).

¹⁶ See Comments of T-Mobile, Declaration of Chris Sykes, WC Dkt. No. 05-25, RM-10593, ¶ 5 (June 13, 2005).

competitor prior to their mergers with SBC and Verizon, relied on the ILEC 90 and 95 percent of the time to serve their end user customers.¹⁷

C. TWTC And One Communications Remain Heavily Reliant On ILEC Loop Facilities And Can Only Construct Loops In A Limited Number Of Locations

TWTC's and One Communications' experience further support the conclusion that competitors have only been able to deploy their own local transmission facilities to a small fraction of the commercial buildings in the country. For example, legacy TWTC (excluding Xspedius' facilities)¹⁸ serves 20,221 customer locations and has been able to deploy loops to only 7,884 locations. Therefore, legacy TWTC serves approximately one quarter of its buildings on-net. This is so even though TWTC has likely deployed its own loop facilities to more commercial buildings than any other competitor.

ILECs often argue that there are many CLECs that construct their own loops and sell loops at wholesale. When TWTC seeks to purchase loop transmission from competitive wholesalers, however, it can purchase no more than a handful of loops from each competitor. Thus, despite TWTC's best efforts to purchase local transmission facilities from competitors, it only purchases approximately **[proprietary begin]** **[proprietary end]** loops at DS-1 or above from competitors.

It is important to emphasize that TWTC is no more able to rely on competitive wholesalers for Ethernet service than for DS1 or DS3 service. TWTC purchases Ethernet

¹⁷ See Comments of WorldCom, CC Dkt. Nos. 01-321 et al., at 9 (Jan. 22, 2002); *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local exchange Carrier Rates for Interstate Special Access Services*, Declaration of Kenneth Thomas, RM Docket No. 10593, ¶ 3 (Oct 15, 2002).

¹⁸ Legacy Xspedius has a much higher percentage of off-net facilities, because its customers generally purchase lower levels of capacity.

loops from competitive wholesalers to [proprietary begin] [proprietary end].¹⁹ These [proprietary begin] [proprietary end] represent less than [proprietary begin] [proprietary end] of the well over [proprietary begin] [proprietary end] locations to which TWTC provided Ethernet service at retail.²⁰

D. Competitors' Reliance On ILEC Local Transmission Facilities Is Increasing

While the ILECs' control over bottleneck local transmission facilities is unquestionable today, there is reason to expect that competitive carriers' reliance on ILEC local transmission facilities will grow in the future. For example, customers increasingly demand that their carriers serve more of their customer locations. In the past, TWTC could limit the number of off-net buildings to which it offered Ethernet because it could focus on serving a customer's locations with on-net facilities. For example, even though a customer might have 20 locations, TWTC's network might only reach one of those locations. Now however, that same customer might demand that TWTC serve most or all of its 20 locations. TWTC normally cannot deploy its facilities to most or all of the new locations, thus causing it to rely on the ILECs' local transmission facilities to reach more locations than was the case in the past.

¹⁹ For a discussion of the extent to which TWTC utilized competitive Ethernet wholesalers as of last year, *See* Reply Declaration of Graham Taylor, ¶ 7 attached to ex parte presentation of Time Warner Telecom, WC Dkt. No. 06-74 (filed Aug. 8, 2006) attached hereto as Appendix A, ("*Taylor Reply Decl.*"). In addition, attached hereto in Appendix A is Graham Taylor's initial declaration, filed in the AT&T/BellSouth merger proceeding. *See* Declaration of Graham Taylor attached to Petition to Deny of Time Warner Telecom, WC Dkt. No. 06-74 (filed June 5, 2006) ("*Taylor Decl.*").

²⁰ [proprietary begin] [proprietary end] *See id.*

ILECs often argue that competitors' networks are near thousands of buildings, *enabling competitors to serve these buildings with their own loops*. This assertion ignores the economic realities of loop deployment.²¹ As the FCC has long recognized, loop deployment is almost entirely dependant upon the relationship between the revenue opportunity available and the cost of loop deployment in each individual case. *See, e.g., TRRO ¶ 149; TRO ¶ 298.*

In determining whether it is able to construct a fiber lateral loop to a building that is near its fiber network, TWTC compares the revenue opportunity available at the location with the costs of construction. **[proprietary begin] [proprietary end]**

For carriers like One Communications that serve the vast majority of its customers with DS1s or a single DS3 of service, it is almost never possible to self-deploy loop facilities. Indeed, One Communications has only deployed loop facilities to no more than a handful of locations in nearly all of its markets.²² It must therefore rely on the ILEC for virtually all of its off-net facilities.

It is also important to emphasize that competitors face the same barriers when providing packetized services such as Ethernet as they do when deploying more established TDM, OCn and Ethernet services. The economics of loop deployment do not magically improve when a different protocol is used to transmit the signal. The same trench must be dug, the same fiber must be laid and similarly priced electronics must be

²¹ In other contexts, the ILEC recognize that CLECs simply cannot deploy loops in many instances. *See, e.g., CLEC Network Extension Cost Model*, Cambridge Strategic Mgmt. Group (Apr. 26, 2001), Attach. RLS-18 to Direct Testimony of Rebecca L. Sparks, SBC Texas, PUC Texas Dkt. No. 28745 (filed Jan. 27, 2004) ("*CSMG Study*").

²² **[proprietary begin] [proprietary end]**

attached. Therefore, TDM and Ethernet services must provide the same revenue stream at a particular location to justify deployment.

E. Neither Cable Modem Service, Nor Wireless Broadband, Nor Satellite Service Constitutes a Viable Substitute For Special Access Service

The FCC has long held that cable modem service, wireless and satellite broadband are simply not capable of providing a viable alternative to traditional special access services. This continues to be true today. Thus, the existence of cable, wireless and satellite end user connections in no way diminishes the market power that the ILECs derive from their control over wireline local transmission facilities needed to serve business customers.

Cable. It is important to understand that cable companies offer two very different types of data transmission service targeting two very different product markets: (1) cable modem service, capable of serving residential and the very smallest business customers and (2) fiber-based TDM and Ethernet special access services. The latter services utilize the same types of facilities, technologies and networks used by traditional CLECs and ILECs. Therefore, fiber-based competition from cable companies cannot be considered “intermodal” competition. The FCC found as much in the *TRRO*. See *TRRO* n.514. In fact, in deploying fiber-based services, cable companies face the same high barriers to entry faced by traditional CLECs. For this reason, cable companies, like traditional CLECs, can serve only several thousand buildings with special access services.

The FCC has found that cable modem service is generally not offered in the areas where large businesses are located (*see TRO* ¶ 52) and does not offer the service characteristics demanded by business customers. See *TRRO* ¶ 193. The FCC has also held that the vast price differential between cable companies’ cable modem based

services and their fiber-based services only underscores the fact that they these products belong very different market segments. *See id.* n. 119.

For example, while Cablevision charges only \$49.95 per month for its up to 10/2 Mbps cable modem product,²³ it charges \$1,300 per month for a 10 Mbps symmetrical fiber connection.²⁴ Moreover, even if cable modem service were a substitute for special access service, cable companies have no obligation to provide cable modem facilities at wholesale, and do not do so as a matter of practice.

In light of the apparently limited reach of their fiber networks, cable companies largely target the smallest of small business customers which can be served by their much more widespread cable modem service. Therefore, as the ILECs admit, most cable companies are simply not providing any competition to RBOCs or CLECs in the retail or wholesale special access marketplace. In AT&T's latest earnings call, for example, CFO Richard Linder asserted that "[i]n small and medium business...we are not seeing a lot of [competition] in the market at this point [from cable companies], other than probably from Cox who has been in the market for some time."²⁵ Moreover, cable companies are only targeting small businesses with "10 lines and under, maybe even four lines and under." *AT&T Q207 Transcript*. AT&T's churn to cable companies is in the single

²³ *See* Cablevision Systems Corp., *Optimum Pricing*, at <http://www.optimum.com/business/ool/pricing.jsp>.

²⁴ *See* Cablevision Systems Corp., *Optimum Lightpath, E-Line Pricing*, at <http://www.optimumlightpath.com/Interior214.html>.

²⁵ *See* AT&T Q2 2007 Earnings Call Transcript (July 24, 2007), available at <http://seekingalpha.com/article/42142> (*AT&T Q207 Transcript*).

digits. *Id.* For these reasons, AT&T is “not seeing a lot of impact” from cable company competition in the business market. *Id.*

Fixed Wireless and Satellite Nor do fixed wireless or satellite services offer an alternative to the ILEC local transmission facilities serving commercial buildings. The FCC recently reported that fixed wireless and satellite broadband represent less than two percent of the total high-speed lines in service.²⁶ Fixed wireless and satellite markets remain nascent, comprising just over one percent of the total high-speed lines in service. *See WCB Report.* Successful deployment of fixed wireless services continues to elude major license holders of spectrum. As early as 2002, the Commission reported that technical limitations, availability of capital, costs of deployment, and problems associated with building access had all caused terrestrial fixed wireless service providers to exit the market or scale back their offerings very substantially.²⁷ That trend has continued. For example, in 2004 the FCC touted IDT’s reorganization toward using its upper millimeter band spectrum for private line services and leasing as evidence for the increasing availability of fixed wireless broadband.²⁸ IDT has since abandoned those plans.²⁹

²⁶ *See High-Speed Services for Internet Access: Status as of June 30, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau, Table 1 (January 2007) (“*WCB Report*”).

²⁷ *See 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*, Third Report, 17 FCC Rcd 2844, App. B ¶¶ 31-39 (2002) (“*Third Broadband Report*”).

²⁸ *See Availability of Advanced Telecommunications in the United States*, Fourth Report, 19 FCC Rcd 20549, at 22 (2004).

²⁹ *See* IDT Corp. SEC Form 10-K Annual Report for the Fiscal Year Ended July 31, 2006, at 2 (filed Oct. 16, 2006) (“In June 2006, we decided to halt the expansion of our IDT Spectrum operating unit and eliminated the majority of its workforce. We expect a

The bankruptcies and financial problems of major satellite service providers that serve business customers provide even more evidence for the prohibitively high costs of providing last mile satellite connections.³⁰ Moreover, technological factors, such as the need for clear line of sight to the south and the loss of signals in cases of heavy snow or rain, also limit the extent to which satellite offers a viable substitute for medium and large businesses. *See Third Broadband Report* ¶ 49. The Commission itself has recently recognized that “fixed wireless connections are not always technically feasible or economically feasible.”³¹

It is therefore unsurprising that the GAO found that wireless technologies are simply not a viable alternative to wireline special access services.³² As the GAO found,

decrease in IDT Spectrum’s revenues in fiscal 2007. We continue to explore strategic alternatives for the assets and operations of this business.”).

³⁰ *See For Globalstar, Bankruptcy Is No Panacea*, Satellite News, Feb. 25, 2002 (discussing the bankruptcy filing of the satellite voice and data service company), available at <http://siliconinvestor.advfn.com/readmsg.aspx?msgid=17113758>; Jared Bazy, *Beleaguered Satellite Industry Looks to 2002*, Telecommunications, Jan. 1, 2002 (discussing “[b]ankruptcy filings from Globalstar, an end to the planned merger between ICO and Teledesic, a divestiture from Astrolink by TRW and Lockheed Martin, and failures by Iridium and Elypso”), available at http://findarticles.com/p/articles/mi_m0TLC/is_1_36/ai_83150943.

³¹ *See AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 ¶ 48 (2006).

³² GAO Report at 18 (“Alternative supply for dedicated access can also be provided by competitors in the form of alternative technologies, such as point-to-point wireless connections. Some industry analysts when we spoke were encouraged by the prospect of fixed wireless and WiMax technology that could provide alternative dedicated access. However, according to these analysts, this technology is still being developed and has only been used in limited circumstances to replace high-capacity dedicated access connections.”).

satellite and fixed wireless simply have not developed sufficiently to offer alternatives to *special access*.³³

III. THE FCC'S SPECIAL ACCESS RATE REGULATIONS ARE FATALLY FLAWED

Notwithstanding the overwhelming evidence that the ILECs control the only loop facilities serving the vast majority of commercial buildings nationwide, the Commission has largely deregulated ILEC special access prices. It has done so by (1) freeing ILECs of any rate regulation in metropolitan statistical areas in which they meet triggers that bear no relationship to the amount of facilities-based competition in the area and that are fatally flawed in other respects; and (2) failing to effectively regulate the prices of even those ILEC special access services that remain subject to rate regulation.

A. The FCC's Special Access Pricing Flexibility Triggers Are Incoherent.

The existing pricing flexibility triggers are incoherent in many respects. *First*, they utilize an inappropriate geographic market, since they deregulate ILEC special access prices throughout an MSA based on indications of competitive entry in only a subset of the MSA. For example, to obtain Phase II pricing flexibility (*i.e.*, the elimination price caps) for interoffice transport throughout an MSA, an ILEC need only show that one collocated carrier using non-ILEC interoffice transport is present in 50 percent of the wire centers in an MSA or in wire centers representing 65 percent of the ILEC's transport revenues in an MSA.³⁴ To obtain Phase II pricing flexibility for special

³³ See *TRRO* n.508 ("The record does not indicate that other intermodal options, such as fixed wireless and satellite, offer significant competition in the enterprise loop market.")

³⁴ See *Access Charge Reform, et al.*, Fifth Report and Order and Further Notice of Rulemaking, 14 FCC Rcd 14221, ¶¶ 148-49 (1999) ("*Pricing Flexibility Order*").

access channel terminations throughout an MSA, an ILEC need only show that one collocated carrier using non-ILEC transport is present in 65 percent of the wire centers in an MSA or in wire centers representing 85 percent of the ILEC's channel termination revenues in the MSA. *See Pricing Flexibility Order* ¶ 150. The ILECs themselves have asserted that their special access revenues are often concentrated in a relatively small number of wire centers within a metropolitan area. *See Verizon New York MSA Petition* at 19. This means that an ILEC can meet the Phase II triggers and escape rate regulation throughout the MSA by demonstrating that fiber-based collocations exist in a very small number of wire centers within the MSA. As the FCC has itself concluded, "this test provides *little indication* that competitors have self-deployed alternative facilities, or are not impaired outside of a few highly concentrated wire-centers." *TRO* ¶ 397 (emphasis added).

Second, the special access regulatory framework fails to account for important distinctions among special access product markets. For example, the current rules differentiate only between (1) connections to customer premises (channel terminations) and (2) other dedicated transmission facilities. Yet, as the Commission has concluded over and over, the differences in revenue opportunities among different levels of capacity (*e.g.*, between a DS1 and OC48) dictate that certain capacities are suitable for competitive supply, while others are not. *See, e.g., TRRO* ¶ 149; *TRO* ¶ 298. This failure to incorporate capacity into the pricing flexibility analysis leads to numerous false positives; assumptions that a service is subject to competition when in fact it is not.

Third, the use of collocations as proxies for competitive entry is clearly *inappropriate*.³⁵ *The problem with relying on collocations as a proxy for competition is most obvious with regard to loops. This is so because collocations can be deployed where there is no competitive loop deployment and loop deployment can occur in locations distant from collocations. When a competitor collocates in an ILEC wire center, it does so primarily for the purpose of gaining access to the ILECs' special access channel termination circuits or unbundled loops, not for constructing its own loop facilities. For example, there are many carriers such as One Communications that collocate in ILEC wire centers in order to serve their customers nearly exclusively via ILEC DS1 and DS0 loops. Since DS1s and DS0 loops cannot generally be competitively supplied, One Communications must satisfy its demand with ILEC facilities. See id. Indeed, One Communications has deployed in over 700 collocation arrangements [proprietary begin] [proprietary end] Conversely, for carriers like TWTC that do construct loop facilities in certain circumstances, collocations are a poor proxy for determining where deployment is possible. For example, as the Commission has recognized, competitive carriers like TWTC generally deploy facilities to commercial*

³⁵ The Commission admitted in the pricing flexibility order itself that collocation-based triggers might present an inaccurate picture of competitive loop deployment. *See Pricing Flexibility Order* ¶ 103 (“As a number of parties indicate, a competitor collocating in a LEC end office continues to rely on the LEC’s facilities for the channel termination between the end office and the customer premises, at least initially, and thus is susceptible to exclusionary pricing behavior by the LEC, and so collocation by competitors does not provide direct evidence of sunk investment by competitors in channel terminations between the end office and the customer premises.”). The Commission chose to use such a test merely because “it appear[ed] to be the best option available . . . at th[at] time.” *Id.*

buildings from splice points in their fiber transport rings, (see TRRO ¶ 153) which may be many miles away from the closest end-office in which the carrier has collocated.

Fourth, the triggers include no mechanism for reviewing the extent to which collocators continue to compete in an MSA. Once an ILEC demonstrates that it has met a trigger in an MSA, it is freed from regulation in the future even if the collocators upon whom it relied to meet the triggers exit the market or are acquired by the ILEC itself. This is obviously highly relevant now that AT&T and Verizon have acquired legacy AT&T and MCI, the two carriers that likely had more fiber-based collocations than any other competitors.

B. In Adopting The Special Access Pricing Flexibility Triggers, The Commission Relied On Assumptions That Have Since Been Disproven.

Despite some misgivings regarding the accuracy of its triggers, the Commission was willing to establish its pricing flexibility framework based on several assumptions regarding the nature of the special access market and regulations. These assumptions, however have since proven to be incorrect. Most importantly, the Commission assumed that special access inputs would be most crucial to IXCs, not CLECs: “[W]e note that these services generally are purchased by IXCs.” *Pricing Flexibility Order* ¶ 155. *See also id.* ¶ 142. The Commission did not even consider the possibility that competitive providers of local exchange and special access services would themselves purchase loops and transport from ILECs under special access tariffs. In explaining why ILECs would be unlikely to exploit pricing flexibility to discriminate unreasonably among special access customers, the Commission emphasized that IXCs are large businesses that purchase special access and “generate significant revenues for the incumbent and are not without bargaining power with respect to the incumbent.” *Id.*