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14 August 2007

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
Washington, DC 20554

Re: CORRECTED FILING
WC Docket No. 05-25; RM-10593

Dear Ms. Dortch:

The redacted version of comments of ATX *et al.* filed via ECFS in this proceeding on August 8, 2007 omitted pages 6 through 9 of the pleading.

I am herewith filing via ECFS the version of the redacted comments that was filed hard copy to your office that includes the pages missing from the original ECFS filing.

Sincerely yours

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VIA HAND DELIVERY AND ECFS

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

August 8, 2007

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Suite 5-C327
Washington, DC 20554

REDACTED - FOR PUBLIC INSPECTION

Re: WC Docket No. 05-25, RM 10593

Dear Secretary Dortch:

On behalf of ATX Communications, Inc., Bridgecom International, Inc., Broadview Networks, Inc., Cavalier Telephone, LLC, Deltacom, Inc., Integra Telecom, Inc., Lightyear, Inc., McLeodUSA Telecommunications Services, Inc., Penn Telecom, Inc., RCN Telecom Services, Inc., SAVVIS, INC., and U.S. Telepacific Corp. d/b/a Telepacific Communications, enclosed for filing in WC Docket No. 05-25 is the original and four copies of the redacted version of their comments, which includes the Declarations of Kevin Albaugh, Don Eben, and Steven H. Brownworth. Also attached are two additional copies of these comments for filing in RM-10593. A copy of this filing is also being submitted in the Commission's Electronic Comment Filing System (ECFS).

Please note that one copy of the confidential version of this filing is being provided to you and two copies of the confidential version are being provided to Pam Arluk or Margarat Daily, Wireline Competition Bureau, under separate cover.

An extra copy of this filing is also attached. Please date stamp and return it to the courier.

Should you have any questions about this filing, please contact me.

Sincerely,

Patrick J. Donovan

Enclosure

cc: Margaret Dailey (all via e-mail)
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

COMMENTS OF

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Summary

Although the Commission has called for additional comments, the current record amply justifies prompt reform of the Commission's special access pricing rules that apply to price cap ILECs. The current record shows that BOCs have the ability to charge exorbitant and increasing prices and impose other unreasonable terms and conditions because they control access to the overwhelming majority of customer locations. The current record also demonstrates that BOCs are exploiting their control of access to customer locations by charging prices that dramatically exceed any reasonable estimate of forward-looking cost, which in turn produce excessive rates-of-return. In addition, BOCs are imposing anticompetitive conditions such as region-wide commitments that have no relationship to cost.

Experience since 2005 provides further evidence that the Commission's special access pricing rules are fatally flawed and in dire need of reform. Prices and unconscionable rates of return, which were unlawful in 2005, have increased and remain unlawful. In 2006, the BOCs' special access rates-of-return averaged an astounding 78 percent rate-of-return. This return far exceeds the Commission's last authorized rate-of-return of 11.25 percent and provides further evidence the Commission's regulatory framework governing special access pricing has failed because it is not producing reasonable rates. A quick review of the much lower rates that BOCs are assessing for retail services that have far greater speeds than a special access DS1 circuit demonstrates that special access rates are patently unreasonable. In fact, the BOCs' overcharges yielded an incredible $8.31 billion in excessive special access revenues or $22.78 million in overcharges per day in 2006.

The BOCs' anticompetitive conduct continues today because they remain in control of last mile bottleneck facilities. Recent BOC mergers have exacerbated the potential for BOC abuse of this control by eliminating actual and potential competitors and by increasing BOCs' incentive and ability to discriminate against competitors. Conditions imposed on these mergers do not eliminate the need for special access reform because they are temporary, do not apply to all price cap ILECs, permit unreasonable prices to remain, and do not address the most serious unreasonable terms and conditions. BOCs have no incentive to offer commercially reasonable alternatives to their standard DS1 and DS3 special access service offerings. In fact, affected CLECs are withdrawing or are planning to withdraw from service areas where BOCs have been or may be granted forbearance from their § 251(c)(3) loop and transport unbundling obligations because the BOCs' excessive special access prices prevent CLECs from offering competitive local exchange services.

The GAO issued a report in November of 2006 that confirms that significant reform of the special access pricing regime is warranted. The GAO found that facilities-based competition to end users is not extensive and that competitive alternatives exist in only a relatively small set of buildings; that prices for special access services in MSAs with Phase II pricing flexibility are on average higher than prices elsewhere; and that the effects of Phase I and Phase II pricing flexibility contracts on prices serve to impede rather than promote competition.

The Commission should reinitialize special access prices at cost-based, forward-looking levels using state approved UNE rates as proxies. As an alternative, the Commission could invite BOCs to file forward-looking cost studies. The Commission's price cap regime should include an X-factor of 10-11 percent for special access, sharing requirements, and separate baskets for DS1, DS3, OCn, mass market broadband and DSL, and retail special access. The Commission should also abolish Phase II pricing flexibility. There is no theoretical or practical justification for BOCs to raise prices in response to competition because competition should produce price reductions. The Commission should not permit conditions on volume and term discounts that are not reasonably related to costs or efficiencies of providing volume and term offerings. Finally, the Commission should adopt a "fresh look" so that customers locked in by current unreasonable BOC tariffs may choose another provider. This opportunity should only be at the election of the special access customer.

TABLE OF FREQUENTLY USED SHORT CITATIONS

Federal Decisions

Verizon	*Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002)

FCC Decisions

1996 Access Charge Reform NPRM	*Access Charge Reform*, CC Docket No. 96-262, Notice of Proposed Rulemaking, 11 FCC Rcd 21354 (1996)
1997 Price Cap Review Order	*Price Cap Performance Review for Local Exchange Carriers*, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, 12 FCC Rcd 16642 (1997) (subsequent history omitted)
AT&T-BellSouth Merger Order	*AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Doc. No. 06-74, Memorandum Opinion and Order, FCC 06-189 (rel. Mar 26, 2007)
AT&T-BellSouth Merger Order on Reconsideration	*AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Doc. No. 06-74, Order on Reconsideration, FCC 07-44 (rel. Mar 26, 2007)
Access Charge Reform Order	*Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982 (1997) (subsequent history omitted).
AT&T Price Cap Order	*Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking*, 4 FCC Rcd 2873 (1989)
CALLS Order	*Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report

	and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (subsequent history omitted)
LEC Price Cap Order	*Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) (subsequent history omitted)
Local Competition Order	*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No 96-98, First Report and Order 11 FCC Rcd 15499 (1996) (subsequent history omitted)
Omaha Forbearance Order	*Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223, 20 FCC Rcd 19415 (2005)
Pricing Flexibility Order	*Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (subsequent history omitted)
SBC-Ameritech Merger Order	*Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer of Control*, Memorandum Opinion and Order, CC Docket No. 98-141, 14 FCC Rcd 14712, (1999).
SBC-AT&T Merger Order	*SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Doc. No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290 (rel. Nov. 17, 2005)
TRO	*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and

	Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004)
TRRO or *Triennial Review Remand Order*	*Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 (2005), *aff'd, Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006)
Special Access NPRM	*Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, FCC 05-18 (rel. Jan. 31, 2005).
Verizon-MCI Merger Order	*Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005)

Ex Parte and Other Filings

Ad Hoc 6/13/05 Comments	Comments of the Ad Hoc Telecommunications Users Committee, WC Doc. No. 05-25 (filed June 13, 2005)
Ad Hoc 6/13/05 Declaration of Susan Gately	Comments of the Ad Hoc Telecommunications Users Committee, Declaration of Susan M. Gately WC Doc. No. 05-25 (filed June 13, 2005)
Ad Hoc 7/29/05 Reply Comments	Reply Comments of the Ad Hoc Telecommunications Users Committee, WC Doc. No. 05-25 (filed July 29, 2005)

Ad Hoc 7/29/05 Reply Declaration of Susan Gately	Comments of the Ad Hoc Telecommunications Users Committee, Reply Declaration of Susan M. Gately WC Doc. No. 05-25 (filed July 29, 2005)
AT&T 10/15/02 Declaration of Kenneth Thomas	Petition for Rulemaking of AT&T, Declaration of Kenneth Thomas, RM-10593 (filed Oct. 15, 2002)
BellSouth 6/15/05 Comments	Comments of BellSouth, WC Doc. No. 05-25, (filed June 13, 2005)
Broadwing *et al.* 6/13/05 Comments	Comments of Broadwing Communications, LLC and Savvis Communications Corporation, WC Doc. No. 05-25 (filed June 13, 2005)
BT Americas 6/13/05 Comments	Comments of BT Americas Inc., WC. Doc. No. 05-25 (June 13, 2005)
COMPTEL *et al.* 6/13/05 Comments	Comments of CompTel/ALTS, Global Crossing North America, Inc., and NuVox Communications, WC Doc. No. 05-25 (filed June 13, 2005)
COMPTEL 6/13/05 Declaration of Janet Fischer	Comments of CompTel/ALTS, Global Crossing North America, Inc., and NuVox Communications, Declaration of Janet S. Fischer, WC Doc. No. 05-25 (filed June 13, 2005)
COMPTEL *et al.* 7/29/05 Comments	Comments of CompTel/ALTS, Global Crossing North America, Inc., and NuVox Communications, WC Doc. No. 05-25 (filed July 7, 2005)
Declaration of Lee Selwyn (dated Nov. 8, 2004) (filed in RM-10593 Dec. 7, 2004)	Letter from David L Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, RM 10593 (attaching, inter alia, "Letter from C. Frederick Beckner III to Marlene H. Dortch, dated November 8, 2004 (with ex parte Declaration of Lee Selwyn)") (filed Dec. 7, 2004)
Declaration of M. Joseph Stith (dated Oct. 4, 2004) (filed in RM-10593 Dec. 7, 2004)	Letter from David L Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, RM 10593 (attaching, inter alia, "Declaration of M. Joseph Stith (October 4, 2004)") (filed in RM-10593 Dec. 7, 2004)
GAO Report	U.S. GENERAL ACCOUNTABILITY OFFICE, REPORT

	TO THE TO THE CHAIRMAN., COMMITTEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES - TELECOMMUNICATIONS, "FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES (November 2006)
Joint CLECs 6/13/05 Comments	Comments of ATX Communications Services, Inc., BridgeCom International, Inc., Broadview Networks, Inc., Pac-West Telecom, Inc., US LEC Corp, and U.S. Telepacific Corp. d/b/a Telepacific Communications, WC Doc. No. 05-25 (filed June 13, 2005)
Joint CLECs 7/29/05 Reply Comments	Reply Comments of ATX Communications Services, Inc., BridgeCom International, Inc., Broadview Networks, Inc., Pac-West Telecomm, Inc., US LEC Corp, and U.S. Telepacific Corp. d/b/a Telepacific Communications, WC Doc. No. 05-25 (filed July 29, 2005)
ETI White Paper	Comments of the Ad Hoc Telecommunications Users Committee, Attachment A - Economics and Technology, Inc., *Competition in Access Markets: Reality or Illusion – A Proposal for Regulating Uncertain Markets* dated August 2004, WC Doc. No. 05-25 (filed June 13, 2005)
Reply Declaration of Lee Selwyn (dated Oct. 19, 2004) (filed in RM-10593 Dec. 7, 2004)	Letter from David L Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, RM 10593 (attaching, inter alia, "Reply Declaration of Lee Selwyn (October 19, 2004)") (filed Dec. 7, 2004)
SBC 6/13/05 Declaration of Parley Castro	Comments of SBC Communications, Inc., Declaration of Parley C. Castro, WC Doc. No. 05-25 (filed June 13, 2005)
Sprint 6/13/05 Comments	Comments of Sprint Corporation, WC Doc. No. 05-25 (filed June 13, 2005)
T-Mobile 6/13/05 Comments	Comments of T-Mobile USA, Inc., WC Doc. No. 05-25 (filed June 13, 2005)
T-Mobile 6/13/05 Declaration of Simon J.	Comments of T-Mobile USA, Inc., Declaration of

Wilkie	Simon J. Wilkie, WC Doc. No. 05-25 (filed June 13, 2005)
Verizon 6/13/05 Declaration of William Taylor	Comments of Verizon, Declaration of William E. Taylor, WC Doc. No. 05-25 (filed June 13, 2005)
WilTel 6/13/05 Comments	Initial Comments of WilTel Communications, LLC, WC Doc. 05-25 (filed June 13, 2005)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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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

ATX COMMUNICATIONS, INC.
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ATX Communications, Inc., Bridgecom International, Inc., Broadview Networks, Inc., Cavalier Telephone, LLC, Deltacom, Inc., Integra Telecom, Inc., Lightyear, Inc., McLeodUSA Telecommunications Services, Inc., Penn Telecom, Inc., RCN Telecom Services, Inc., SAVVIS, INC., and U.S. Telepacific Corp. d/b/a Telepacific Communications submit these comments in response to the Commission's request that parties refresh the record in this proceeding.[1]

[1] *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, Public Notice, WC Docket No. 05-25, RM-10593, FCC 07-123, released July 9, 2007.

I. THE EXISTING RECORD JUSTIFIES REFORM OF RULES GOVERNING SPECIAL ACCESS

Although the Commission has called for additional comments, the previous record gathered by the Commission in response to the *Special Access NPRM*, as well as in response to AT&T's petition for rulemaking, justifies prompt reform of rules governing provision of special access by price cap ILECs. The record already shows that the underpinning of BOCs' ability to charge high and increasing prices, and to impose unreasonable non-price terms and conditions, is that BOCs control access to the overwhelming majority of customer locations within their respective regions. AT&T Corp. in its initial petition showed that, despite its ownership of one of the most extensive national networks, its large traffic volumes, superior resources, and bargaining power, it was dependent on the BOCs for access to customer locations in the vast majority of situations. It reported that it had facilities to only about 6,000 of the 3 million commercial buildings in the country – a mere one-fifth of one percent.[2] Further, AT&T acknowledged that it relied on ILEC last mile special access channel terminations 95% of the time in reaching commercial buildings and was able to utilize a CLEC alternative for only 2% of its needs.[3] Numerous other commenters with first hand experience in seeking alternatives to BOC services confirmed their dependence on BOCs for last mile access.[4] And even where a

[2] AT&T 10/15/02 Declaration of Kenneth Thomas, at 1.

[3] *Id.*

[4] MCI reported a comparable dependence on ILEC special access circuits and estimated that 90% of its off-net special access circuits were provisioned by ILECs. *Performance Measures and Standards for Interstate Special Access,* CC Docket No. 01-321, Comments of WorldCom, Inc. Corporation, at 9-10 (Jan. 22, 2002); Broadwing 6/13/05 Comments at 14 ("[w]ith relatively few exceptions – predominantly owned by AT&T and MCI – the ILECs own the *only* last mile link to the target buildings and, therefore, anyone who wants to serve customers in those buildings must either purchase access from the ILEC or from another carrier

competitive provider offers special access to a location, building access issues might nonetheless result in the BOC being the only provider of access to most customers in a building.[5]

The record also demonstrates that intermodal providers do not provide a realistic alternative to BOC special access for a number of reasons. Cable operators do not offer wholesale access, and where they have facilities, they are not generally able to provide the robust level of service that business customers in particular require.[6] Similarly, the existing record shows that fixed wireless is an inadequate replacement for wireline special access services because of operational and security concerns and because it is available only to a tiny percentage of business customer lines.[7] And the Commission itself had already found before initial comments were filed that BOCs control access to the vast majority of customer locations[8] and that intermodal alternatives are not viable substitutes to wireline services.[9]

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reselling the ILEC's services.") ETI White Paper at iv, 12, 16.(ILECs "remain the sole source of connectivity at roughly 98% of all business premises nationwide, even for [these] largest corporate users.")

[5] ETI White Paper at 18, n.32; Comments of Sprint Corporation, RM Doc. No. 10593, at 4 (filed Dec. 2, 2002).

[6] ETI White Paper at 27.

[7] ETI White Paper at 23-24. (Fixed wireless accounts for only about 25,000 enterprise lines nationwide which, assuming they were all special access lines, would amount to less than two hundredths of a percent of the special access market)

[8] The Commission concluded that competing carriers were impaired absent unbundled DS1 transport, DS3 transport, and DS1 loops in all but 5.4%, 8.5%, and 0.5% respectively of BOC wire centers. *TRRO*, ¶¶ 5, 24, 115, 118-119, n.337, 126; 129-130, 146, 166, 171-174, 178-179 ("competitive deployment of stand-alone DS1-capacity loops is rarely if ever economic"); *TRO*, ¶¶ 386-387, 391-392.

[9] *TRRO*, ¶ 193 ("record contains little evidence that cable companies are providing service at DS1 or higher capacities," and in fact "suggests that most of the businesses served by cable companies are not large enterprise customers, but mass market small businesses that would never generate enough traffic to require a high-capacity loop.").

Nor is there any doubt on the present record that BOCs are exploiting their control over access to customer locations. The Commission's predictive judgment in the *Access Charge Reform Order* [10] was that competition would have long before now reduced special access prices to forward looking cost.[11] But a comparison to prices for the same services and facilities that have been set at forward looking cost has shown that special access prices are excessive. As of two years ago, prices for BOC special access DS 1 loops ranged from 125% to nearly 400% above comparable UNE prices for the same services and facilities.[12] Even considering that TELRIC pricing for UNEs is under consideration by the Commission and even if TELRIC were modified at the request of the BOCs, this comparison shows that special access prices are excessive under any reasonable estimate of forward looking costs. At the time initial comments in this proceeding were filed, the BOCs' rates-of-return for interstate special access service based on their own ARMIS reporting data were substantially above the Commission's maximum prescribed reasonable rate-of-return of 11.25%. As of the year ended 2004, the BOCs' special access rates of return were as follows: Verizon – 31.6%, SBC – 76.2%, Qwest – 76.8% and BellSouth – 81.2%. Overall, the BOCs averaged a 53.7 percent rate-of-return.[13] And, as shown

[10] *Access Charge Reform Order*, ¶ 42, 44, 263-265.

[11] *Access Charge Reform Order*, ¶ 44.

[12] T-Mobile 6/13/05 Declaration of Simon J. Wilkie, ¶ 19, Appendix 2, at 1.

[13] Ad Hoc 6/13/05 Declaration of Susan M. Gately, ¶ 9. These excessive rates-of-return for interstate special access occur within the context of excessive earnings for interstate services as a whole. BellSouth's, Qwest's, SBC's, and Verizon's total interstate returns for 2004 were 20.3, 28.7, 22.2. and 15.9 percent, respectively. ARMIS Report 43-01, Table I, Column (h), Row 1915/Row 1910; *see also* Comments of SBC, Declaration of David Toti, Attachment 7, WC Doc 05-25 (filed June 13, 2005). As shown below, BOCs' average rate-of-return for all interstate services in 2006 was 26.13%. BOCs' excessive overall interstate earnings refutes any argument that excessive earnings in special access are offset by underearning elsewhere.

in later sections of these comments, these rates-of-return have continued to skyrocket. Although BOCs were invited to do so, they have declined so far in this proceeding to provide a study demonstrating their forward looking costs or showing their rate-of-return under any reasonable methodology.

Moreover, the record already shows that the Commission's pricing flexibility rules misidentify areas where competition might be sufficient to constrain BOC prices for special access. The Commission's test for Phase II pricing flexibility has merely allowed BOCs to raise prices. BOC special access prices in most instances are significantly higher than (sometimes more than double) the rates charged for the same services under price cap regulation.[14] For example, as shown in Table 1 below, Qwest's special access DS1 rates have increased dramatically since it obtained Phase II special access pricing flexibility in the Omaha MSA. The rates are significantly higher than the price cap DS1 rates that would apply had it not received Phase II special access pricing relief:

Table 1								
Comparison of Qwest's DS1 Channel Termination Non-Plan Price Cap Rates With Phase II Pricing Flexibility Rates								
Month to Month Rates (No Term)			**1 Year Term Monthly Rates**			**2 Year Term Monthly Rates**		
Price Cap[15]	Price Flexibility[16]	% Increase	Price Cap	Price Flexibility	% Increase	Price Cap	Price Flexibility	% Increase
$120.00	$175.00	45.83%	$116.40	$166.00	42.61%	$114.00	$150.00	31.58%

Moreover, Qwest's monthly pricing flexibility rate for 10 miles of DS1 transport is 48% higher than the corresponding price cap rate.[17]

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[14] Sprint 6/13/05 Comments at 5.

[15] *See* Qwest - FCC No. 1 Section 7.11.4, at 7-347 (same cite applies to the 1 and 2 year term price cap rates shown in Table 1).

[16] *See* Qwest - FCC No. 1 Section 17.2. 11, at 17-91 (same cite applies to the 1 and 2 year term Phase II pricing flexibility rates shown in Table 1).

Other evidence in the record also reveals that based on various term rates Qwest's DS1 channel terminations are 22 to 47 percent higher in Qwest pricing flexibility areas than under Qwest's price caps and DS1 mileage rates are 13 to 71 percent higher in BellSouth pricing flexibility areas than under BellSouth's price caps.[18] BellSouth did not contest the fact that its month-to-month prices for DS1 and DS3 special access services had increased and conceded that by 2005 these tariffed rates had gone up by 8 to 9 percent.[19] SBC did not dispute the fact that its Phase II basic tariff rates are higher than those in price cap MSAs.[20] For its part, rather than provide readily available price information that could have refuted that it has raised prices, Verizon attempted to change the subject to comparisons of voice grade equivalent revenues in an effort to mask its abuse of pricing flexibility.[21] Thus, on the current record, BOCs have not been able to justify price increases where pricing flexibility has been granted. If the Commission's rules accurately identified competitive areas, prices would be *lower* in areas where showings of competition justify Phase II pricing flexibility under FCC rules, not higher than where prices remain subject to price caps.

As the Commission has observed, market power can be evidenced through unreasonable terms and conditions of service in addition to excessive prices.[22] The current record shows this

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[17] *Compare* Qwest FCC No. 1 Section 7.11.4.C.1.a, at 7-354.1 (the price cap rate for a 10 mile DS1 circuit is $170.00), *with* Qwest FCC No. 1 Section 17.2.11.C.1.a, at 17-98 (Phase II pricing flexibility rate for a 10 mile DS1 circuit is $252.00).

[18] COMPTEL *et al.* 6/13/05 Comments at 7, COMPTEL 6/13/05 Declaration of Janet S. Fisher, ¶ 5 & Table 1.

[19] BellSouth 6/15/05 Comments at 14-16.

[20] SBC 6/13/05 Declaration of Parley Castro, at n.49.

[21] Verizon 6/13/05 Declaration of William E. Taylor, ¶ 16.

[22] *Special Access NPRM,* ¶¶ 114-125.

to be the case. Commenters point out, for example, that the Commission has found that BellSouth had unlawfully discriminated against interexchange carriers by offering a term and volume discount plan that was especially favorable to its own long distance affiliate.[23]

Similarly, the record provides abundant evidence that BOCs tie unreasonable terms and conditions to volume discounts. For example, BOCs condition the availability of discounts to a customer's previous purchase level. While discounts that vary based on the *current* purchase level can be reasonable, BOC discounts based on prior purchase level are tantamount to growth discounts, which the Commission has proscribed.[24]

Further, the current record shows that BOCs condition discounts on region-wide purchases and on limiting purchases from competitors or purchase of UNEs. For example, Qwest has recently insisted on a non-negotiable basis on region-wide purchases as a condition of providing special access discounts in Omaha, Nebraska.[25] AT&T continues to impose a 95%-98% Access Service Ratio, precluding CLEC customers from choosing UNEs where they are available, and discouraging end users from buying special access from competitive access providers unless the competitive providers can serve most or all of the end user's access needs.[26]

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[23] *AT&T Corp. v. BellSouth Telecommunications, Inc.*, File No. EB-04-MD-010, Memorandum Opinion and Order, FCC 04-278 (rel. Dec. 9, 2004).

[24] *Pricing Flexibility Order*, ¶¶ 134-135; see also Comments of AT&T Corp., WC Doc. 05-25, at 7 (filed June 13, 2005).

[25] Petition to Modify of McLeodUSA Telecommunications Services, Inc., WC Doc. No. 04-223, at 5 & 11 (filed July 23, 2007).

[26] *See* Pacific Bell Telephone Company, Tariff F.C.C. No. 1, Section 33.54, Contract Offer No. 54., Section 33.54.4(F): Pacific Bell Telephone Company, Tariff F.C.C. No. 1, Section 33.56, Contract Offer No. 56., Section 33.56.2(A)(4).

The Supreme Court antitrust case of *Lorain* Journal *Co. v. United States,* 342 U.S. 143 (1951) is on point. There, a newspaper, whose advertising space was indispensable to local businesses, refused to sell advertising space to businesses that also advertised on a local radio station. This was held to be anticompetitive and in violation of Section 2 of the Sherman Act, 47 U.S.C. § 2. The BOC's conditions stifle competition in the same manner.

All of these conditions are unreasonable because they are unrelated to costs, or efficiencies that BOCs could experience when providing service on a volume or term commitment basis. These conditions express the BOCs' incentive and ability to extract concessions from carrier-customers who lack other alternatives to BOC services for access to customers in the vast majority of locations. By imposing these conditions, the BOC can effectively eliminate whatever competition it might otherwise face by making the choice of competitive service highly unattractive or impossible through ineligibility for discounts.

The BOCs' practices make it difficult or impossible for others to compete with them in the provision of special access unless they can offer special access wherever the BOC does. These conditions are no more than efforts by BOCs to "lock up" customers and prevent them from choosing competitive services.[27] BOC efforts to tie discounts to commitments unrelated to cost or efficiencies are closely analogous to, and may constitute, impermissible tying under antitrust law.[28]

[27] *See Pricing Flexibility Order*, ¶ 79 (explaining that an incumbent can forestall the entry of potential competitors by "locking up" large customers by offering them volume and term discounts at or below cost).

[28] A claim for anticompetitive tying under § 1 or § 2 of the Sherman Act, is established where (1) there are two distinct products; (2)the defendant has power in the market for the tying product;(3) the defendant ties the two products together and will not sell the tied product without

As discussed in the next section of these comments, experience since the last round of comments reinforces the need for special access reform.

II. EXPERIENCE SINCE 2005 STRENGTHENS THE NEED FOR SPECIAL ACCESS REFORM

A. Prices and Unconscionable Rates-of-Return Have Increased and Remain Unlawful

The Commission recognizes that the level of competition in a market can be measured by the absence of substantial and sustained price increases. As numerous special access purchasers demonstrated in their comments filed in 2005, the Commission's special access regulatory regime has failed to discipline the BOCs' market power or prices for special access. Although, as shown above, they were already overearning on the provision of special access in 2004, since then they have since significantly raised their DS1 and DS3 special access rates where given Phase II pricing flexibility and have been able to retain customers despite these dramatic price increases.[29]

The BOCs' behavior has continued and will continue absent regulatory restraints. For instance, since June 2005, Qwest's Phase II pricing flexibility rates for critical last mile DS1 facilities increased by approximately 25 percent[30] and are 47 percent higher than the price cap

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the other; and (4) the tie forecloses a substantial volume of commerce. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 9, 16, 21-22 (1984); *United States v. Microsoft Corp.*, 253 F.3d 34, 58, 84 (D.C. Cir.), *cert. denied,* 122 S. Ct. 350 (2001); *Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 462 (1992).

[29] *See e.g.*, Joint CLECs 6/13/05 Comments, at 10-13; Joint CLECs 7/29/05 Reply Comments at 14-19.

[30] *See* Qwest FCC No. 1 Section 17.2.11.A.1, at 17-91(Price Flex). Since June of 2005, the DS1 zone 1 monthly rate increased from $132.5 to $165.

rates that would otherwise apply.[31] Moreover, with respect to a Zone 1 DS1 circuit with two channel terminations and 10 miles of channel mileage, Qwest's and Verizon's pricing flexibility rates are, depending on the term of the contract, between 30 to 47 and 23 to 48 percent higher, respectively, than price cap rates.[32] Moreover, with respect to a Zone 1 DS3 circuit with two channel terminations and 10 miles of channel mileage, Qwest's pricing flexibility rates are, depending on the term of the contract, between 53 to 68 percent higher, respectively, than price cap rates.[33]

AT&T and Verizon have refrained to some extent from increasing their rates since the end of 2005 only because, as merger conditions, they agreed not to increase their Phase II special access pricing rates for 30 months.[34] At the end of 2006, AT&T agreed to reduce a limited set of its Phase II pricing flexibility rates for 48 months to price cap levels as a condition of obtaining FCC approval of its merger with BellSouth.[35] While these merger conditions were voluntary, competition did not force AT&T and Verizon to offer them. Rather, they were essentially imposed by the FCC in exchange for merger approval.

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[31] The monthly Zone 1 price cap rate is rate is $112.30 and the pricing flexibility rate is $165. *Compare* Qwest FCC No. 1 Section 7.11.4.A.1, p. 7-347 (Price Cap), *with* Qwest FCC No. 1 Section 17.2.11.A.1, at 17-91(Price Flex).

[32] *See* Ad Hoc Comments, Declaration of Susan Gately, DS1 Pricing Comparisons (filed August 8, 2007).

[33] *See* Ad Hoc Comments, Declaration of Susan Gately, DS3 Pricing Comparisons (filed August 8, 2007).

[34] *See SBC-AT&T Merger Order*, at 122 & 124; *Verizon-MCI Merger Order*, at 132 & 134.

[35] *AT&T-BellSouth Merger Order on Reconsideration*, at 5; *AT&T-BellSouth Merger Order*, at 151. AT&T/BellSouth's merger condition originally required other BOCs and price cap ILECs to lower their Phase II rates as well as a precondition to obtaining such rates from AT&T/BellSouth; however, the other BOCs vigorously disputed this precondition on discrimination grounds and AT&T withdrew it. *AT&T-BellSouth Merger Order on Reconsideration*, ¶ 4.

AT&T is ignoring these commitments and planning to increase prices in the former BellSouth region for provision of dark fiber as a special access service, which it refers to as "dry fiber," through the ruse of terminating this offering and converting it to a "commercial offering."[36] Competitive carrier experience is that unregulated commercial offerings are invariably higher priced than the previous alternative. The Commission should consider this tactic when evaluating the extent of special access price increases absent price cap regulation.

In addition, the BOCs' steadily increasing and extraordinarily high rates-of-return since 2005 demonstrate that the Commission's regulatory framework governing special access pricing has failed because it is not producing reasonable rates. As of the year ended 2006, the BOCs' special access rates-of-return based on ARMIS data were as follows: AT&T - 100%; Qwest – 132%. Verizon – 52%. Overall, the BOCs averaged an astounding 78 percent rate-of-return.[37]

These returns are not a short term phenomena. Indeed, since the passage of the Telecommunications Act of 1996 to the present, the average special access category earnings have steadily increased from 8.25[38] percent in 1996 to a remarkable 53 percent at the end of 2004.[39] They then jumped to 68 percent at the end of 2005 before hitting an all time high of 78

[36] Letter received by Deltacom addressed to Valued AT&T Customer from AT&T Southeast, entitled *AT&T Southeast Region 9-State - Discontinuance of Dry Fiber*, dated July 13, 2007.

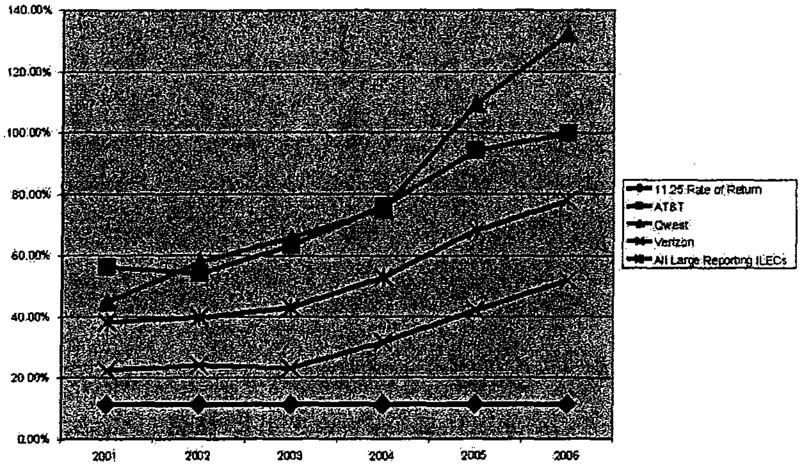
[37] The annual rates of return were calculated using ARMIS data reported for interstate special access services. Specifically, we divided the net return by average net investment to calculate the rates of return. *See* ARMIS 43-01, Table 1, Cost and Revenue, rows 1910, 1915, col. s.

[38] ETI White Paper at 29.

[39] Ad Hoc 6/13/05 Declaration of Susan Gately, ¶ 9.

percent at the end of 2006. Table 1 below illustrates the incredible increasing of rates of return among the BOCs from 2001-2006.[40]

Table 1
Interstate Special Access ARMIS Rates of Return 2001-2006



While the BOCs have long argued that ARMIS data is irrelevant to assessing their rate-of-return for interstate special access, such claims should be rejected. ARMIS data is the BOCs' own reported data. It strains credulity for BOCs to claim it should be ignored. Moreover, ARMIS data was designed for the purpose of evaluating rate-of-return using BOCs' embedded costs and is completely appropriate for that purpose.[41] Further, ARMIS data is showing such high rates-of-return that no amount of tweaking would show that BOCs are not earning unconscionable rates-of-return.[42]

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[40] AT&T's historical rates of return referenced in Table 1 reflect the returns of SBC and BellSouth on an aggregated basis.

[41] ETI White Paper at 35.

[42] *See* ETI White Paper at 29-28; Reply Declaration of Lee Selwyn (Oct. 19, 2004) (filed in RM-10593 Dec. 7, 2004) at 47-83; Declaration of Lee Selwyn (Nov. 8, 2004) (filed in RM-10593 Dec. 7, 2004) at 17-28; WC Docket No. 05-65, Reply Declaration of Lee Selwyn at 49-55 (May 10, 2005).

Moreover and despite the BOCs' refrains that ARMIS rates-of-return are not ideal due to certain misallocations, that "does not affect the overall integrity of *trends* in the data, *since those (arguable) misallocations do not change from period to period.*"[43] Stated differently, "even if the absolute rate of return developed for the special access category using ARMIS data is off by some percentage, *the trend in the data (in this case steadily up [as shown above]) ... [is] a reliable indicator of the BOCs' ability to increase prices to supracompetitive levels without fear of attracting competitive entry.*"[44]

Ratepayers and the public at large are harmed by funding the BOCs' supracompetive profits, paying astronomical special access rates or increased retail rates for services (such as wireless telephone service) that rely on special access services. A comparison of year-end 2003 data with the FCC's most recently authorized return level for interstate service of 11.25 percent reveals that excessive special access charges resulted in overcharges equal to $5.5 billion, which otherwise means that BOCs were overcharging special access ratepayers $15 million per day.[45] During 2004, the BOCs' excessive overcharges went up 15 percent - the BOCs' overcharges yielded a whopping $6.4 billion in excessive special access revenues or $17.5 million per day.[46] From 2004 to 2006, the BOCs' overcharges skyrocketed by an astonishing 30 percent - *the*

[43] ETI White Paper at 29.

[44] ETI White Paper at 29 (emphasis added).

[45] ETI White Paper at 7-8 Table 1.1; Ad Hoc 6/13/05 Declaration of Susan M. Gately, ¶ 6.

[46] Ad Hoc 6/13/05 Declaration of Susan Gately, ¶ 6.

BOCs' overcharges yielded an incredible $8.31 billion in excessive special access revenues or $22.77 million in overcharges per day in 2006.[47]

Updated Table 2
2006 RBOC Overcharges

		Calculation		Total Interstate		Special Access
1	Average Net Investment		$	24,866,133,000	$	7,579,276,000
2	Net Return		$	6,497,614,000	$	5,901,062,000
3	ROR	Line1/Line 2	$	26.13%	$	77.86%
4	Approved ROR	11.25%	$	11.25%	$	11.25%
5	Tax Rate	39.25%	$	39.25%	$	39.25%
6	Overearnings	(Line 3-Line 4)*Line 1	$	3,700,177,075.00	$	5,048,391,575
7	Overcharging	Line 6/(1-Line 5)	$	6,090,826,461	$	**8,310,109,558**
8	Daily Overcharges	Line 7 / 365	$	16,687,196	$	22,767,424

Sources: Federal Communications Commission, ARMIS Report 43-04, Access Report: Table 1, Cost and Revenue YE 2006. Available at http://svartifoss2.fcc.gov/eafs7/adhoc/table_year_tab.cfm?reportType=4304 (accessed Aug. 2, 2007). 39.25% is the composite tax rate currently used in the FCC's HCPM/HAI Synthesis Cost Proxy Model. http://www.fcc.gov/wcb/tapd/hcpm/welcome.html

Nor are the BOCs' special access prices lawful. The United States Supreme Court and lower courts have consistently held that where "returns have greatly exceeded a fair percentage of return upon a fair base, it follows as a matter of law that the rates charged . . ., instead of being 'just and reasonable' . . .[are] excessive."[48] The Commission has similarly recognized that only firms with market power can expect to consistently earn profits that greatly exceed economic profits.[49]

[47] This Table 2 is based on Table 1.1 of Ad Hoc 6/13/05 Declaration of Susan M. Gately and updated to reflect 2006 figures.

[48] *Potomac Elec. Power Co. v. Public Utils. Comm'n of the District of Columbia*, 158 F.2d 521, 523 (D.C. Cir. 1947) (citing and quoting *Dayton-Goose Creek Co. v. United States*, 263 U.S. 456, 483 (1924) ("If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so").

[49] *Local Competition Order*, ¶ 700 ("Normal profit is embodied in forward-looking costs because the forward-looking cost of capital, i.e., the cost of obtaining debt and equity financing,

At bottom, the foregoing demonstrates that the Commission's special access pricing rules are not working and permit the BOCs to charge monopolistic rates. When the price cap regime was implemented, the Commission made clear that observed returns remain the litmus test for determining whether the specific price cap rules are working to protect consumers from unjust and unreasonable rates or if the rules need to be overhauled. In fact, the Commission stated that a "price cap approach cannot free carriers to earn excessive [supracompetitive] profits in light of their costs."[50] It further emphasized that its price cap regime would include "ongoing monitoring" and that a future "comprehensive review" of the price cap mechanism would "focus prominently on the carrier costs and profits."[51] Accordingly, the BOCs' supracompetitive rates-of-return further demonstrates that special access prices are unreasonable and that the Commission's regulatory framework governing interstate special access is fatally flawed and in dire need of reform.

B. Verizon's Pricing for FiOS Service Shows that Special Access Pricing Is Above Cost Plus a Reasonable Rate of Return

It is clear from the disparity in rates for special access and other comparable technologies that the BOCs are extracting monopoly rents from their special access services. For example, Verizon offers 5 Mbps / 2 Mbps FiOS to small businesses at a rate of $99.99 dollars per month

is one of the forward-looking costs of providing network elements"); Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission (issued 1992, revised 1997) ("Market power to a seller is the ability to profitability to maintain prices above competitive levels for a significant period of time").

[50] *AT&T Price Cap Order,* 4 FCC Rcd 2873, ¶ 885.

[51] *AT&T Price Cap Order*, 4 FCC Rcd 2873, ¶ 885.

(with a static IP address.)[52] Its DS1 special access offering, at significantly lower speeds, is $197.00.[53] If Verizon is able to charge such low rates for newly deployed, unamortized facilities, this raises questions about why it needs to charge such high rates for lower capacity facilities that are substantially depreciated. Special access facilities that rely on older technologies, such as TDM multiplexing, and have likely been fully depreciated, should be less expensive than Verizon's newly deployed and state-of-the-art high-capacity, fiber-optic FIOS service. At a minimum, a forward-looking cost structure that applies to special access services should result in rates that are no higher than what the BOCs charge for comparable services using newly deployed technology.

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[52] Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, FCC at 4 (filed May 11, 2006 in *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, MB Docket No. 05-311).

[53] Verizon Tariff F.C.C. No.1 § 7.5.9(A)(1).

C. Additional BOC Mergers Increase the Need for Reform

1. Increased Concentration Facilitates Potential for Harm

As many commenters in this proceeding predicted,[54] the mergers of AT&T with SBC and MCI with Verizon eliminated most of the little competition that existed in the special access market and ensured the BOCs' power to inflate their special access prices. The mergers have also encouraged exclusionary conduct in the special access market and have undermined competition in other markets through monopoly control of critical special access inputs.

Prior to the mergers, AT&T and MCI were the largest competitive suppliers of special access services in the nation,[55] as confirmed by the experience of competitive carriers, such as Sprint and Broadwing, in seeking alternatives to BOCs' facilities.[56] The DOJ found that SBC and AT&T were the only two firms that owned or controlled a direct wireline connection to hundreds of commercial buildings throughout the legacy AT&T footprint and that the merger of SBC and AT&T would effectively eliminate competition for facilities-based special access service to those buildings.[57] It made similar findings in regard to the Verizon - MCI merger.[58] It recognized that because competitive entry is a difficult, time consuming, and expensive process,

[54] *See, e.g.*, BT Americas 6/13/05 Comments at 7-12; Broadwing *et al.* 6/13/05 Comments at 4, 19-22; Sprint 6/13/05 Comments at 7-8; WilTel 6/13/05 Comments at 12-13.

[55] BT Americas 6/13/05 Comments at 7; Declaration of Alfred E. Kahn and William E. Talyor on behalf of BellSouth, Qwest, SBC and Verizon, RM-10593, at 23-24 and Table 14, (filed Dec. 2, 2002).

[56] *See, e.g.*, Broadwing et al. 6/13/05 Comments at 4 & 19 ("The SBC-AT&T and Verizon-MCI mergers will therefore reduce the competitive provision of special access facilities in the SBC and Verizon regions from three potential suppliers to two.").

[57] United States v. SBC Communications, Inc. and AT&T Corp., 1:05CV02102 (EGS), Department of Justice Competitive Impact Statement at 6-7 (D.D.C. filed Nov. 16, 2005).

[58] *See* United States v. Verizon Comms., Inc. and MCI, Inc., No. 1:05CV02103 (HHK), Department of Justice Competitive Impact Statement (D.D.C. filed Nov. 16, 2005).

competitive access providers would typically only build into a particular building after they have secured a customer contract of sufficient size and length to justify the anticipated construction costs for that building. Thus, entry would not be timely, likely, or sufficient to eliminate the competitive harm that would result from SBC's acquisition of AT&T.[59] The Commission itself has also recognized that large fixed and sunk costs, economies of scale, the difficulty of securing rights-of-way, and operational impediments make it unlikely that other competitive carriers will be able to replace the services and facilities that were offered by AT&T and MCI.[60] As predicted, the mergers removed the two largest suppliers of special access from the market.

On the demand side of the equation, AT&T and MCI also exerted some limited market discipline on BOC special access prices by virtue of their large volume of purchases and the threat of extending their own fiber networks to reach some locations.[61] This limited market disciplining effect was lost with the mergers. This shrunken market has suppressed investment in special access services by non-BOC providers, fearful of never recovering huge sunk costs required to compete in the special access market.[62]

Paradoxically, this reduction in demand also reduced the supply of discounted special access services. In addition to constructing their own facilities, AT&T and MCI were two of the very few carriers with sufficient demand to qualify for the highest volume discounts offered by

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[59] United States v. SBC Communications, Inc. and AT&T Corp., 1:05CV02102 (EGS), Department of Justice Competitive Impact Statement at 8 (D.D.C. filed Nov. 16, 2005).

[60] *TRRO*, ¶¶ 150-151.

[61] Broadwing *et al.* 6/13/05 Comments at 19-21.

[62] BT Americas 6/13/05 Comments at 10.

the BOCs, which they were able to pass on as resellers. These discounted rates are no longer available to the vast majority of competitive carriers.

Of course, these combined companies are also able to fashion discounts that are uniquely available only to each other. In January 2007, Verizon filed a new contract tariff for which AT&T is likely the only carrier that could qualify.[63] The possibility of this cross-BOC discounting further points to the need for reform of rules governing BOC special access service.

2. Increased Economies of Scale Reduce BOC Costs

The BOCs have consistently touted the efficiencies to be gained from their mergers, but the benefits have not accrued to consumers of special access. In the latest merger, AT&T claimed vertical integration efficiencies flowing from the integration of BellSouth's local exchange network with AT&T's long distance network,[64] and the Commission agreed. It found that "significant benefits are likely to result from the vertical integration of the complementary networks and facilities of AT&T and BellSouth. . . . [T]he combination of their services will benefit large enterprise and wholesale customers by enhancing the merged entity's ability to make available the broad range of communications services and global reach that those customers demand."[65] Using exactly the same boilerplate language, the Commission touted the efficiencies to be gained by the SBC-AT&T merger[66] and the Verizon-MCI merger as well.[67]

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[63] Verizon Telephone Companies, Tariff FCC No. 14, Section 21.22 (Contract Tariff Option 21) at 21-171 through 21-191.

[64] AT&T-BellSouth Merger Application, WC Doc. No. 06-74, at 40-46 (filed Mar. 31, 2006).

[65] *AT&T-BellSouth Merger Order*, ¶ 212.

[66] *SBC-AT&T Merger Order*, ¶ 191.

[67] *Verizon-MCI Merger Order*, ¶ 203.

The mergers will increase the merged companies' opportunities to achieve economies of scale and scope and even higher rates-of-return. If even a portion of the efficiencies could be directly assigned to special access costs, the companies will experience considerable special access cost savings through consolidation of management and overhead functions, thus permitting higher rates-of-return for special access. Considering that, as discussed elsewhere in these comments, BOCs were already earning excessive and increasing rates-of-return for special access before the mergers, the increased economies of scale and scope that the mergers permit increase the need for special access reform.

The Commission has also recognized that, even without the merger efficiencies, the telecommunications industry in general and LECs in particular tend to realize productivity gains that are much greater than the economy as a whole. This is the reason that the Commission included an X-factor in the original price cap regime, *i.e.* to reflect these productivity gains in the ILEC cost basis.[68] The current price cap regime, however, does not, in effect, have an X-Factor because under the *CALLS Order* the Commission converted the X-Factor into a transitional mechanism unrelated to productivity that reduced switched access rates to a specific target and lowered special access rates only for a specified period of time.[69] Therefore, at the present time, the X-Factor is equal to zero and all the alleged efficiency gains that BOCs have touted to the Commission as benefits of their various proposed mergers produce no benefit at all for special

[68] *LEC Price Cap Order*, ¶¶ 74-119.

[69] *CALLS Order*, ¶ 140. The special access X-factor was set at 3.0 percent in 2000, 6.5 percent for the next three years, and equal to the GDP-PI thereafter, essentially freezing the special access PCI (after accounting for exogenous cost adjustments) *CALLS Order*, ¶ 149.

access customers. Under the current price cap plan, BOCs are the only beneficiaries of productivity gains.

As discussed later in these comments, to address this shortcoming and to be consistent with the justification given by the Commission in the *LEC Price Cap Order* for use of an X-Factor, the Commission should re-impose a productivity-based X-factor in the price cap formula to ensure that rates continue to decline relative to the measure of inflation, GNP-PI.[70] Although the Commission should, at a minimum, apply the X-factor prospectively, it should also apply it retroactively back to 2004, when the Commission, under the CALLS Plan, effectively eliminated the X-factor and froze the PCI.

3. Larger BOC Footprints Increase Incentive for BOCs to Harm Competitors Through Excessive Pricing of Their Essential Inputs

The Commission has previously recognized that the larger the combined entity, the more incentive it will have to discriminate because of gains from external effects.[71] Before the BOC mergers, discrimination by one BOC against a competitor created anticompetitive spillover benefits for other BOCs in other regions that the discriminating BOC could not share. A merger between the discriminating BOC and another BOC would, however, enable capture of the spillover effect within the merged company. In its *SBC-Ameritech Merger Order*, the Commission explained how this spillover effect works in practice: "[A] merger's big footprint will create more incentives for the merged entity to discriminate against competitors . . . ."[72] The Commission concluded that "the level of discrimination engaged in by the combined entity in

[70] *See LEC Price Cap Order*, ¶ 75.

[71] *SBC-Ameritech Merger Order*, ¶ 209.

[72] *SBC-Ameritech Merger Order*, ¶ 209.

each region within the combined territory would be greater than the sum of the level of discrimination engaged in by the two individual companies in their own, separate regions, absent the merger."[73]

In addition to increasing the combined entity's *incentive* to discriminate, the merger would, if allowed to proceed, also dramatically increase the combined entity's *ability* to discriminate. As the Commission found in the *SBC-Ameritech Order,* "The increased ability of the combined entity to discriminate, at least in the absence of stringent conditions, will result from: (1) the reduction in the number of benchmarks, making it more difficult for regulators to monitor and detect misconduct; (2) the ability of the combined entity to coordinate and rationalize the discriminatory conduct of the two companies (sharing 'worst practices'), making detection and proof of discrimination more difficult; and (3) the efficiencies (economies of scope) that result from being able to share strategies and arguments while fighting similar regulatory battles in multiple state forums."[74] And with the loss of much of the Commission's remaining benchmarking capability, the competitors' ability to prove the existence and extent of discrimination will be severely diminished as well.

Only the temporary merger conditions relating to special access have to a limited extent prevented the BOCs from fully exploiting their "big footprints" and charging ever higher rates for critical inputs, but some of those commitments (i.e. Verizon-MCI) expire next summer, while the others (AT&T-BellSouth) expire June 30, 2010. After these commitments expire, the BOCs would have every incentive and the ability to exploit their increased dominance in the

[73] *SBC-Ameritech Merger Order,* ¶ 193.

[74] *SBC-Ameritech Merger Order,* ¶ 209.

special access market in order to raise the costs of key inputs and engage in a price squeeze against competitors in other markets. By engaging in a price squeeze, Verizon and AT&T will be able to provide their own long distance, wireless and other affiliates with a strategic cost advantage for key special access assets while still obtaining supracompetitive prices for their special access services from other carriers and customers.

4. *The Merger Conditions Have Not Mitigated Harms*

Finally, in case there is any doubt on this issue, the special access merger conditions do not ameliorate the potential for harm from the mergers or eliminate the need for reform in this proceeding because they fail to address the most serious harms. Although the conditions provide for protection against some price increases, they do nothing about the excessive level of current prices. Nor do the conditions limit the ability of BOCs to impose anticompetitive conditions on discounts of the type discussed elsewhere in these comments. In any event, even if the conditions provided a significant benefit, they are generally only in effect for thirty months, ending June 30, 2009 or sooner. Nor do they apply to Qwest or other price cap ILECs. The mergers therefore heighten the need for special access reform. Nor do the merger conditions mitigate the reduced ability of regulators to detect and correct anticompetitive conduct in provision of special access service caused by eliminating SBC and BellSouth as independent benchmarks by which to judge other ILECs.

D. BOCs Continue to Possess a Bottleneck

As noted, the current record shows that CLECs are dependent on BOC services for access to up to 95% of customer locations. Recent experience confirms that BOCs continue to possess bottleneck control over access to the vast majority of customer locations. The DOJ concluded in connection with its review of the SBC/AT&T and Verizon/MCI mergers that "for the vast majority of commercial buildings" in their territory, SBC and Verizon are the only carriers that owns a last-mile connection to the building,[75] that CLECs have built or acquired their own last-mile fiber optic connections for only a "small percentage of commercial buildings,"[76] and that SBC and Verizon are the "dominant" providers "of Local Private Lines (special access)" in their service areas.[77] The DOJ's analysis by itself is dispositive of any issue of whether BOCs continue to control bottleneck access to customer locations. And, it is worth noting that BOCs' control of access to customer locations only became worse after the mergers because the DOJ did not require SBC and Verizon, respectively, to divest most AT&T and Verizon circuits. The recent GAO report, discussed in later sections of these comments, also found that competitive alternatives exist in only a small set of buildings.[78] The DOJ and GAO analyses are consistent with the Commission's determinations in the *TRRO* and *TRO* that CLECs are impaired in their ability to serve nearly all business customer locations with out unbundled access to DS1 and DS3 loops and that CLECs are impaired in their ability to provide both narrowband and broadband services without unbundled access to copper loops.[79]

In addition, since initial comments were filed, the Commission had occasion to review the availability of wholesale alternatives to ILEC last mile access in the Omaha, Nebraska MSA.

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[75] DOJ Complaint, USA v. SBC Communications and AT&T Corp., Civil Action No. 1:05CV02102, USDC, ¶ 15; DOJ Complaint, USA v. Verizon Communications, Inc. and MCI, Inc., Civil Action No. 1:05CV02102, ¶ 15.

[76] *Id.*, ¶16.

[77] *Id.*, ¶ 20.

[78] GAO Report at 12 & 19.

[79] *See, e.g., TRRO,* ¶¶ 174, 178; *TRO*, ¶ 248.

The Commission concluded that Qwest was the only provider of wholesale access there.[80] This also shows illustrates that, even in major markets, there are rarely if ever alternatives to BOC last mile facilities.

Apart from these evaluations by regulators, CLECs' experience continues to affirm that there are no realistic alternatives to BOC facilities for access to most customers. The attached declarations of Deltacom, Inc., McLeodUSA Telecommunications Services, Inc., and Penn Telecom, Inc. show that CLECs remain dependent on BOC UNEs or special access in order to provide service to the vast majority of their customers. As explained in those declarations, it is rarely economically feasible for competitive carriers to construct loops at the DS0, DS1, or DS3 capacity levels and competitive carriers are rarely able to find alternatives to BOC last mile facilities to most customer locations. Therefore, in response to the Commission's inquiry in the Public Notice, there have been no significant changes in supply or demand market characteristics that could lead to a conclusion that BOCs do not possess bottleneck control over last mile connections to customers. This permits BOCs to extract unreasonable prices and other terms and conditions from customers that must be addressed by reform of special access rules.

E. BOCs Have Not Offered Viable Commercial Agreements for Loops and Transport

Facilities-based competition is no more effective at counterbalancing the BOC's monopoly power over special access than it was in 2005. It has not prompted the BOCs to offer commercially reasonable alternatives to their standard DS1 and DS3 special access service offerings. Even with their § 271 obligation to offer loop and transport network elements, as explained below, the BOCs refuse to offer anything but their special access services. In fact and

[80] *Omaha Forbearance Order*, ¶ 67.

as discussed below, they are aggressively trying to avoid state commission investigations as to whether their special access offerings are commercially reasonable under § 271. Consequently, many CLECs are withdrawing or are planning to withdraw from service areas where BOCs have been or may be granted forbearance from their § 251(c)(3) loop and transport unbundling obligations because the BOCs' excessive special access prices prevent CLECs from offering competitive local exchange services.

1. The BOCs' Obligation to Offer Section 271 Network Elements Under the Section 201 Just and Reasonable Standard has Not Prompted Them to Offer Rates that are Better than Their Special Access Offerings

In the *TRO*, the Commission held "the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251"[81] and that these facilities must be "priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202."[82] The BOCs are seeking to render this obligation meaningless by vigorously opposing state commission efforts to examine or prescribe rates for their Section 271 offerings, generally in the context of § 252 arbitration or tariff proceedings.[83]

For instance, the Maine Public Utilities Commission ("ME PUC") ordered Verizon to file a wholesale tariff that included all of Verizon's wholesale obligations, both those under § 271 as

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[81] *TRO*, ¶ 653.

[82] *TRO*, ¶ 656.

[83] BOCs generally argue, *inter alia*, that only the FCC has this authority and in doing so, has avoided state commission review of § 271 obligations in most instances and where they have not, they are aggressively appealing the state commission decisions. *See* Attachment 5 for a list of various state commission decisions in the Northeast discussing Section 271 where Verizon has litigated or still litigating this issue.

well as those under § 251 of the Act;[84] however, the tariff Verizon later proposed did not include rates for § 271 elements. Because of this, the ME PUC issued decisions in 2004 and 2005 that required Verizon to continue providing § 271 elements at TELRIC rates as a temporary measure until Verizon filed a tariff proposing rates that the ME PUC determined were just and reasonable.[85] Verizon refused to accept the ME PUC's decisions and appealed them to the United States District Court for the District of Maine, claiming that the ME PUC lacked authority to set rates for § 271 elements and that the ME PUC's decision to require TELRIC rates was preempted.[86] The Court denied Verizon's motion for a preliminary injunction,[87] and later granted the ME PUC's motion for summary judgment, holding that the ME PUC could lawfully set rates for § 271 elements and was not preempted from ordering the provision of § 271 elements at TELRIC rates on a temporary basis.[88] Unwilling to yield to the Court's decision,

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[84] The ME PUC issued these orders because Verizon had previously promised to make this tariff available in return for the ME PUC's support of Verizon's FCC application to enter the InterLATA long distance market in Maine.

[85] *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order Part II at 12-15 & 21, 2004 Me. PUC LEXIS 291, at *25-32 & *44-45 (Me. P.U.C. Sep. 3, 2004), Order at 6, 2005 Me. PUC LEXIS 74, at *24 (Me. P.U.C. Mar. 17, 2005), Order at 19-21, 23-24, 30, 33, 38, 40, 43-44, 2005 Me. PUC LEXIS 267, at *46-47, *49-51, *57-58, *72-73, *78-79, *80-81, *90-91, *92-93, *96-97, *103-106 (Me. P.U.C. Sep. 13, 2005); *aff'd, Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 441 F. Supp. 2d 147 (D. Me. July 18, 2006), *appeal pending, Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, No. 06-2151, (1st Cir. filed Jul. 19, 2006).

[86] In its appeal, Verizon also asserted that the ME PUC erroneously interpreted § 271 checklist item 4 and 5 by requiring Verizon to provide access to line sharing, entrance facilities and dark fiber loops and transport.

[87] *See Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 403 F. Supp. 2d 96, 108 (D. Me. 2005).

[88] *See* 441 F. Supp. 2d at 152-153, 158.

Verizon continued its relentless legal challenge, appealing to the United States Court of Appeals to the First Circuit, where the case is currently pending.[89]

The BOCs vigorously dispute state commission authority to establish § 271 rates and contend that their special access offerings satisfy their § 271 obligations.[90] The last thing they want is to have their special access rates scrutinized by state commissions and potentially found

[89] The New Hampshire Public Utilities Commission ("NH PUC") also held in a number of decisions that Verizon must offer certain 271 elements at TELRIC or at the FCC's prescribed transitional rates until such time as new rates are established and approved by the NH PUC. Verizon challenged these decisions and the appeal is now pending before the First Circuit as well. *See Proposed Revisions to Tariff NHPUC No. 84 (Statement of Generally Available Terms and Conditions); Petition for Declaratory Order re Line Sharing)*, Docket Nos. DT 03-201 and 04-176 (consolidated), Order No. 24,442, Order Following Brief at 41-50, 2005 N.H. PUC LEXIS 24, at *61-75 (N.H. P.U.C. Mar. 11, 2005) and *Verizon New Hampshire Wire Center Investigation, Verizon New Hampshire Revisions to Tariff 84*, DT 05-083 and DT 06-012 (consolidated), Order No. 24, 598, Order Classifying Wire Centers and Addressing Related Matters at 46, 2006 N.H. PUC LEXIS 23, at *74 (N.H. P.U.C. Mar. 10, 2006) *rev'd in part, Verizon New England, Inc. v. N.H. Pub. Utils. Comm'n*, No. 05-CV-94-PB, 2006 U.S. Dist. LEXIS 59339 (D. N.H. 2006), *appeal pending, New Hampshire Public Utilities Comm'n v. Verizon New England, Inc.*, No. 06-2429 (1st Cir. filed Sep. 21, 2006). AT&T and Qwest are also challenging state commission decisions seeking to establish § 271 rates as well. *See, e.g., Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement*, Case No. TO-2005-0336, Arbitration Order, 2005 Mo. PSC LEXIS 963 (Mo. P.S.C. July 11, 2005), *rev'd in part SBC Missouri v. Mo. Pub. Serv. Comm'n, et al.*, No. 04:05-CV-1254 CAS (E.D. Mo. Sep. 14, 2006), *appeal pending*, No. 06-3726 (8th Cir. filed Oct. 17, 2006); *Petition of DIECA Communications, Inc., dba Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Doc. No. T-01051B-04-0425, Decision No. 68440, 2006 Ariz. PUC LEXIS 5 (Ariz. C. C. Feb. 2, 2006), *rev'd in part Qwest Corp. v. Arizona Corp. Comm'n*, No. 2:06-CV-01030-ROS (D. Ariz. July 18, 2007).

[90] *VERIZON-MAINE Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order at 8 (Me. P.U.C. Oct. 6, 2006) (explaining that Verizon position is that its special access rates were lawfully approved by the FCC and that the FCC has "expressly approved" special access rates as the benchmark for section 271 elements). On Qwest's website under its Commercial Agreements, Qwest directs wholesale customers of DS1 and DS3 loop and transport facilities to its special access tariffs. *See* http://www.qwest.com/wholesale/clecs/commercialagreements.htm (accessed July 30, 2007).

unjust and unreasonable. This scrutiny would provide even more evidence that the Commission's special access pricing rules need to be overhauled so that they produce just and reasonable rates.

2. BOCs' Failure to Make Reasonable Access Offerings Harms Competition

In the Commission's *Omaha Forbearance Order*, Qwest was relieved of its § 251(c)(3) loop and transport unbundling obligations in nine Omaha wire centers.[91] The Order was expressly contingent on a "predictive judgment" that Qwest would provide network elements at just and reasonable rates.[92] As explained in McleodUSA's recent petition, despite McLeodUSA's diligent efforts to negotiate commercially reasonable terms for loop and transport services, Qwest has refused to negotiate and has only made its special access service offering available to replace high capacity Section 251(c)(3) network elements for the affected wire centers.[93] Absent relief from the Commission, McLeodUSA has stated that it will exit the Omaha market because of the dramatic cost increases, which would prevent it from providing competitively priced services.[94]

Integra Telecom, Inc. ("Integra") has also emphasized that it entirely abandoned its plans to enter the Omaha market as a result of the *Omaha Forbearance Order*.[95] It found that it was

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[91] *Omaha Forbearance Order*, n.155.

[92] *Omaha Forbearance Order*, ¶ 79.

[93] Petition to Modify of McLeodUSA Telecommunications Services, Inc., WC Doc. No. 04-223, at 4 (filed July 23, 2007).

[94] Petition to Modify of McLeodUSA Telecommunications Services, Inc., WC Doc. No. 04-223, at 14 (filed July 23, 2007).

[95] Comments of Integra Telecom, Inc., WC Docket No. 06-172, at 5 (filed March 5, 2007) ("The Commission's 'predictive judgment' that the ILEC will have an incentive to offer wholesale facilities at reasonable rates to its competitors has proven to be flawed in Omaha. The

substantially less attractive economically to enter the Omaha market without access to unbundled network elements at TELRIC rates "in the entire Omaha market" and decided that "the investments it was prepared to make to provide service in the Omaha market would be better" utilized in other markets.[96] It emphasized the infeasibility of Omaha market entry via deployment at special access rates, noting that it would be extremely difficult for a CLEC to serve small and medium business customers in competition with the ILEC if loops and transport were priced at special access rates.[97] In the Verizon forbearance proceeding, for similar reasons, Cavalier, One, Cbeyond and other carriers also emphasized that they would not be able to continue operations and serve their customers in the MSAs at issue if Verizon was granted forbearance from its 251(c)(3) loop and transport unbundling obligations and CLECs were forced to rely on Verizon's special access facilities.[98]

Thus, the absence of reasonable terms and conditions of access to BOC last mile connections will harm competition that, in turn, will harm customers through reduced choices of prices and service offerings.

III. THE GAO REPORT VALIDATES CLEC CONCERNS

The GAO Report, issued in November of 2006, investigated the BOCs' special access services. Its findings further demonstrate that the Commission's deregulatory special access

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prediction "that Qwest will not react to our decision here by curtailing wholesale access to its analog, DS0, DS1, or DS2-capacity facilities turned out to be wrong").

[96] *Id.* at 4.

[97] *Id.* at 5.

[98] Comments of Time Warner Telecom Inc., et al., WC Doc. No. 06-192, at 21 & 23-26; Opposition of Cavalier Telephone Subsidiaries to Verizon's Petitions for Forbearance, WC Doc. No. 06-172, at 9, Declaration of JimVermeulen, ¶¶ 8-12 (filed Mar. 5, 2007)

pricing regime has failed. In addition, the GAO Report validated the shortcomings that prompted legacy AT&T to file its Petition for Rulemaking in October of 2002, as well as more recent comments filed by other special access purchasers since then in this proceeding.

As a preliminary matter, the GAO Report recognized that the promotion of competition is a key policy objective of the 1996 Act.[99] It emphasized that "[t]he stated outcomes of this policy objective are to lower prices and increase the quality of telecommunications services available to American telecommunications consumers as well as promote the rapid deployment of new telecommunications technologies."[100] While the GAO acknowledged that the FCC is responsible for making these policy objectives a reality,[101] the GAO did not conclude that the FCC was doing so or otherwise satisfying the Act's objectives.

The GAO Report reveals why the Act's pro-competitive objectives are not becoming a reality, especially as to special access services. *First*, the GAO found that facilities-based competition to end users does not appear to be extensive and that competitive alternatives exist in a "relatively small subset of buildings."[102] It examined 16 major metropolitan areas and found that "competitors are serving, on average, less than 6 percent of the buildings with at least a DS-1 level of demand" and that in "buildings identified as likely having companies with a DS-3 level of demand, competitors have a fiber-based presence in about 15 percent of buildings on average."[103] For buildings with 2 DS-3s of demand, it found that competitors have a fiber-based

[99] GAO Report at 37.

[100] GAO Report at 37.

[101] *Id.* at 37.

[102] *Id.* at 12 & 19.

[103] *Id.* at 12.

presence in only 24 percent of these buildings on average.[104] Based on the data analyzed, it found that competitive Phase II areas generally have a lower percentage of lit buildings than Phase I areas, indicating that the "*FCC's competitive triggers may not accurately predict competition at the building level.*"[105]

Moreover, the GAO's data showed that there has been a *decline* in some MSAs in the level of competitive collocation in the wire centers used by the price-cap incumbents to obtain pricing flexibility.[106] It noted that "[l]imited competitive build out in these MSAs could be caused by a variety of entry barriers, including zoning restrictions, or difficulties in obtaining access to buildings from building owners that discourage competitors from extending their networks."[107] In addition, it found that "where demand for dedicated access is relatively small, such as buildings with less than three or four DS-1s of demand, it is unlikely to be economically viable for competitors to extend their networks to the end user."[108]

Second, the GAO concluded that prices for special access services in MSAs with Phase II pricing flexibility are on average higher than prices elsewhere.[109] The GAO found that since the FCC first began granting pricing flexibility in 2001, "prices and revenue are higher on average for circuit components in areas under Phase II flexibility (areas where competitive forces are

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[104] *Id.*.

[105] GAO Report at 12-13 (emphasis added).

[106] *Id.* at 13.

[107] *Id.*

[108] *Id.*

[109] GAO Report at 13 & 27.

presumed to be greatest) than in areas under Phase I flexibility or under price caps."[110] In fact, its comparison of 1,152 prices for channel terminations and dedicated transport for both monthly and multiyear terms revealed that price-flex list prices "were almost always higher than price-cap list prices."[111] This determination was consistent with its finding that "as of 2005, average revenue for channel terminations is higher, on average, in phase II areas than in phase I areas or price-cap areas."[112] More recently, its comparison found that that, "as of June 2006, the price-flex list price was on average higher than the price-cap price, regardless of whether the price was for channel terminations, interoffice mileage, DS-1 or DS-3 service, different term arrangements, or different density zones."[113]

Its research also showed that "price-flex prices as of June 2006 are higher on average than list prices in effect just prior to FCC granting pricing flexibility."[114] The GAO even noted that while the FCC expected price increases in some areas, and these increases would likely be in areas where costs were higher (in which regulation had pushed prices below costs), this was not happening. Rather, "prices increased on average, regardless of density zone or any other parameters."[115]

Third, the GAO found that the effects of Phase I and Phase II pricing flexibility contracts on prices serve to impede rather than promote competition. The GAO explained that these

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[110] *Id.* at 27.

[111] *Id.*.

[112] *Id.* at 28.

[113] GAO Report at 28.

[114] *Id.* at 28.

[115] *Id.* at 28.

"conditions and terms may inhibit switching circuits to competitors" and emphasized that "[c]ustomers who sign contracts may need to meet various conditions, which competitors argue limit customers' ability to choose another provider."[116] It found that "[t]hese conditions include such things as revenue guarantees, requirements for shifting business away from competitors, and severe termination penalties" and that "these types of contracts may inhibit choosing competitive alternatives because the customer does not receive the applicable discount, credit, or incentive if the revenue targets are not met and additional penalties may also apply."[117] The GAO further concluded that "[u]nless a competitor can meet the customer's entire demand, the customer has an incentive to stay with the incumbent and to purchase additional circuits from the incumbent, rather than switch to a competitor or purchase a portion of their demand from a competitor—even if the competitor is less expensive."[118]

Given the above, the GAO criticized the deregulatory actions and access charge reforms the FCC took, in an effort to fulfill the intent of the 1996 Act that involved allowing market forces and competition to govern prices for dedicated access.[119] It recognized that "[a]t the heart of the FCC's actions was a vision of facilities-based competition, where competitors would compete with the incumbents mainly using their own networks and facilities" and that "[u]nder facilities-based competition, incumbents would be constrained from pursuing predatory and exclusionary pricing practices, and prices would be driven toward marginal costs."[120] The Report

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[116] *Id.* at 30.

[117] *Id.* at 30.

[118] GAO Report at 30.

[119] *Id.* at 41-42.

[120] *Id.* at 41-42.

also acknowledged the "FCC's deregulatory actions were predicated on proxy measures that [the] FCC predicted would indicate whether sufficient facilities-based competition existed for dedicated access services in order for market forces to function in this way."[121] GAO Report's analysis of "facilities-based competition suggests that FCC's predictive judgment — that MSAs with pricing flexibility have sufficient competition — may not have been borne out."[122] Its report stressed that "[e]ven 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 and noted that "[t]he effect that such changes may be having on consumers of all sizes, including the federal government, could be significant."[123]

GAO's findings confirm that the issues that special access purchasers raised in 2005 remain valid and that significant regulatory reforms are warranted. Indeed, the Commission's prediction that adequate competitive alternatives exist to constrain price cap ILECs' anticompetitive pricing of special access has proven incorrect and the lack of competition leaves these ILECs free to increase rates significantly when freed from price cap regulation. This evidence combined with the existing record offers far more than the substantial evidence the FCC would otherwise need to justify re-initialization of special access prices and reform the special access pricing rules as proposed herein.

[121] *Id.* at 42.

[122] *Id.* at 42.

[123] GAO Report at 42.

IV. REFORM OF SPECIAL ACCESS RULES IS NECESSARY TO ASSURE REASONABLE RATES AND CONDITIONS

A. Comparing Special Access Rates to UNE Rates is Appropriate and Demonstrates Special Access Rates are Unreasonable and Need to be Reinitialized to Competitive Levels

In its Notice, the Commission requested comment on how to assess the reasonableness of rates for special access services. The Commission previously stated that it expected that by now it would "have additional regulatory tools by which to assess the reasonableness of access charges."[124] For instance, the Commission stressed that it may "establish benchmarks based on prices for the interstate access services for which competition has emerged, and use prices actually charged in competitive markets to set rates for non-competitive services or markets."[125] Another approach is to use DS1 and DS3 UNE loop and transport rates as benchmarks. Comparing these UNE rates with the functionally equivalent special access rates is abundantly appropriate because both services are provided over the same facilities; however, UNE prices are set at the forward-looking, economic levels reflective of a competitive marketplace. Accordingly, UNE prices provide an excellent benchmark by which to assess whether the BOCs' special access prices are at such levels and, therefore, just and reasonable.[126]

The rate comparisons presented in comments filed in 2005 by a wide variety of special access purchasers reveal that UNE rates do approximate competitive prices.[127] Indeed, in the

[124] *Access Charge Reform Order*, ¶ 268.

[125] *Id.*, ¶ 268.

[126] *See Access Charge Reform Order*, ¶¶ 267-68 (explaining that by February 8, 2001, it expects to have "additional regulatory tools by which to assess the reasonableness of access charges").

[127] *See* Joint CLECs 7/29/05 Reply Comments, at 10.

limited circumstances where the marketplace is truly competitive, record evidence reveals that the competitors' rates are comparable to, if not less than, UNE rates.[128] Thus, to the extent the Commission does not have competitors' rates against which to evaluate BOC rates, it can confidently rely on UNE benchmark comparisons.[129]

A comparison of special access rates with UNE rates proves that that special access rates far exceed forward-looking economic costs and are therefore unreasonable.[130] For example, based on a sample of Qwest states, for a one-year term Zone 1 DS1 circuit with two channel terminations and 10 miles of channel mileage, Qwest's pricing flexibility and price cap rates are 87% and 169% greater, respectively, than the average of UNEs rates offered in Arizona, Minnesota, Colorado, Washington, and Iowa.[131] The BOCs' ability to charge special access rates that are multiples of their forward-looking costs is glaring evidence that their special access services are not subject to meaningful competitive discipline as the Commission had otherwise hoped. Thus, given the wide disparity between UNE prices and special access prices, even where pricing flexibility has been granted, it is clear that special access prices grossly exceed the

[128] *Id.*

[129] In addition, the United States Supreme Court found that the TELRIC forward-looking cost estimation upon which UNE rates are derived is a fully valid and compensatory method of calculating a Bells true costs. *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 467-472 (2002). In fact, TELRIC is overly compensatory given that costs must be calculated on the basis of existing wire center locations and given an inevitable regulatory lag in TELRIC price adjustments. *See id.* at 469-470. BOCs have been unable to identify a single instance in which state-adjudicated, cost-based rates for high capacity facilities depart substantially from the BOCs' costs. *See* Worldcom Comments, RM-10593, at 11 (filed Jan. 23, 2003). Nor have they identified any high-capacity UNE rates that fail to include an allocation of common costs. *Id.*

[130] *See* Declaration of M. Joseph Stith (executed Sep. 30, 2004) (filed in RM-10593 Dec. 7, 2004), Attachments 1 & 2 (Comparison Summary of 3-year, 10 & 0 mile Stand Alone Circuits Price Cap-Pricing Flexibility-UNE Rates)

[131] *See* Attachment 4.

forward-looking cost-based pricing that the Commission hoped a deregulatory, market-based approach to special access pricing would have achieved. Because special access prices are not at these levels, this comparison provides compelling evidence that special access rates need to be reinitialized and set at levels that would exist if the market were competitive. It also demonstrates that dramatic reforms of the Commission's special access pricing rules are warranted to ensure that rates stay competitive.

B. Previously Proposed Reforms Remain Valid

1. Special Access Prices Should Be Reinitialized at Cost-Based, Forward-Looking Levels Using State-Approved UNE Rates as Proxies and, as an Alternative, the Commission Could Invite BOCs to File Forward-Looking Cost Studies

As discussed above and in 2005, special access prices are far above forward-looking, cost-based levels; BOCs are earning unconscionable rates-of-return; pricing flexibility rules have backfired in that BOCs have used price cap relief to raise prices; and customers are being harmed by billions of dollars per year in overcharges. Accordingly, as part of permanent reform and as proposed in 2005, the Commission should reinitialize special access prices that would then be subject to modified price cap rules on a going forward basis. The Commission has already recognized that re-initialization may be necessary in the circumstances presented here because the current regulatory framework has failed to produce reasonable prices. In fact, it emphasized that to the extent that competition did not fully achieve the goal of moving access rates toward costs, "the Commission reserves the right to adjust rates in the future to bring them into line with forward-looking costs."[132]

As previously proposed,[133] special access prices should be reinitialized and set at forward-looking economic cost-based levels that are reflective of a competitive marketplace. Taking this approach would be consistent with the Commission's previous conclusion that "access charges should ultimately reflect rates that would exist in a competitive market" and that in a competitive market, rates should reflect forward-looking economic costs.[134] Stated differently, rates should not be established based on historical accounting costs, *i.e.*, embedded costs[135] because "forward-looking costs are generally viewed as more relevant to setting prices in a competitive market" whereas embedded costs are not.[136]

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[132] *Access Charge Reform Order*, ¶ 48; *see also Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps Access Charge Reform Price Cap Performance Review for Local Exchange Carriers*, CC Doc Nos. 96-262 & 94-1, Order, FCC 02-161, ¶ 13 (2002).

[133] *See* Joint CLECs 6/13/05 Comments at 17-24; Joint CLECs 7/29/05 Reply Comments at 39-43.

[134] *See Access Charge Reform Order*, ¶ 42.

[135] *Alenco Communications Co. v. FCC*, 201 F.3d 608, 615 (5th Cir. 2000) ("rates must be based not on *historical, booked costs*, but rather on *forward-looking, economic costs*. After all, market prices respond to current costs; historical investments, by contrast, are sunk and thus ignored").

[136] *Special Access NPRM*, ¶ 65 (explaining that "[e]mbedded costs are associated with past business decisions and generally are irrelevant to a rational profit-maximizing firm operating in a competitive market; only forward-looking costs matter to such a firm with regard to business decisions that it is required to make today.") (citing *See* Alfred E. Kahn, Timothy J. Tardiff, & Dennis L. Weisman, *The Telecommunications Act at Three Years: An Economic Evaluation of Its Implementation by the Federal Communications Commission*, 11 INFO. AND ECON. POLICY 319, 324-25 (1999) ("Among economists, there is widespread agreement in principle that (1) the costs that would be the basis for efficient prices would be forward-looking, rather than historical and (2) the prices set on that basis should emulate the ones that would emerge from local exchange competition, if it were feasible."); Armen A. Alchian & William R. Allen, EXCHANGE

While the forward-looking methodology that should be used could prompt debate, the Commission should take a pragmatic and easily administrable approach at this point. This would involve setting special access prices at state-approved TELRIC prices for comparable UNEs, rather than setting entirely new rates for BOCs' special access services based on comprehensive and detailed forward-looking cost studies. This approach is a less burdensome and straightforward method of setting initial rates because it does not require cost studies or an extensive and expensive rate investigation.

In addition, although perhaps not the only acceptable forward-looking approach, TELRIC is a pricing approach already approved by the Commission (and the Supreme Court). While TSLRIC pricing methodology may also be acceptable, under both TSLRIC and TELRIC-based pricing methodologies,[137] prices reflect forward-looking economic costs, including a reasonable

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AND PRODUCTION 222 (3d ed. 1983) ("Once [an item] is acquired, [its costs are] irrelevant to the setting of price in competitive markets."); N. Gregory Mankiw, PRINCIPLES OF ECONOMICS 291 (1997) ("The irrelevance of sunk costs explains how real businesses make decisions."); Paul A. Samuelson & William D. Nordhaus, ECONOMICS 167, (16th ed. 1998)).

[137] The Commission previously held that "Prescribing TSLRIC-based access rates would be the most direct, uniform way of moving those rates to [forward-looking economic] cost" indicative of a competitive marketplace. *Access Charge Reform Order*, ¶ 289. TSLRIC stands for "total service long run incremental cost" and "total service" refers to the entire quantity of the service (either single service or a class of similar services) that a firm produces, along with the costs of dedicated facilities and operations used in providing that service. *See Local Competition Order*, ¶ 677. "TELRIC rates" are rates for unbundled network elements and interconnection based on TELRIC cost assumptions. The FCC coined and adopted the term TELRIC in the *Local Competition Order* to describe a different version of that methodology, one based on the specific network element or elements to be priced. *Local Competition Order*, ¶ 678 (discussing both methodologies). Essentially, TELRIC is an unbundled version of TSLRIC methodology, pricing discrete network elements rather than entire services. The Commission has concluded that "in practice" TELRIC "prices are based on the TSLRIC of the network element."[137] *Local Competition Order*, ¶ 672.

allocation of forward-looking joint and common costs, and permit ILECs to earn a fair, risk-adjusted rate-of-return on their investments.[138]

Employing TELRIC costing principles is bolstered by the fact that the Commission is very familiar with the TELRIC-based UNE rates BOCs charge. In fact, when it was considering their 271 applications, the Commission has extensively reviewed and examined them. During the § 271 proceedings and in approving all the § 271 applications, the Commission found, with minimal exceptions, that the state commissions followed basic TELRIC principles and established UNE rates that reflected the forward-looking economic cost of providing those elements.[139] While the Commission did not conduct *de novo* reviews of state commission TELRIC pricing determinations, it approved the applications so long as the UNE rates were within a zone that a reasonable application of TELRIC would produce.[140] Hence, the Commission can be confident that state commission-approved UNE prices closely approximate the forward-looking levels that would otherwise exist in a competitive market.

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[138] *1996 Access Charge Reform NPRM*, ¶ 222; *Local Competition Order*, ¶ 672.

[139] *See Local Competition Order*, ¶¶ 672-78; 47 C.F.R. §§ 51.501 *et seq.* (1999).

[140] *See, e.g., Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc., for Authorization To Provide In-Region, InterLATA Services in California*, WC Docket No. 02-306, Memorandum Opinion and Order, 17 FCC Rcd 25650, ¶ 71, Appendix C ¶ 45 (2002). To determine whether UNE rates are "outside the range that the reasonable application of TELRIC principles would produce," the Commission undertakes comparisons of rates in the applicant's state to rates it has previously found to be TELRIC-compliant in another state. *See id.*, ¶¶ 54 & 71; *see also Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, ¶¶ 81-82 (2001) *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

Because UNE prices are state-specific, they are inherently granular and exemplify forward-looking costs associated with providing facilities in each state. If the Commission prefers not to establish state-specific rates, it could establish a weighted average of UNE rates across a BOC region. Taking this latter approach may be unnecessary, however, because it appears that BOCs are already assessing state-specific special access rates as a result of pricing flexibility[141] and thus, requiring BOCs to assess state specific UNE rates for special access service would not be burdensome for BOCs to implement.

Another pro-competitive reason for setting special access rates at UNE rate levels is that doing so will encourage BOCs to operate in a cost-effective manner as a competitive market requires. Indeed, just as TELRIC provides BOCs with an incentive to operate in a forward-looking least-cost fashion, special access rates that reflect similar assumptions would pressure them to operate in a similar manner because they would only be allowed to recover efficiently incurred costs.

For the foregoing reasons, special access prices should be set at state-approved UNE prices. It is the most readily available forward-looking pricing approach and involves a minimum of burden on all parties concerned. If the Commission is considering other alternatives, state-approved UNE rates could also be used initially as a proxy for some other forward-looking approach that the Commission might choose as a permanent solution. If the BOCs, however, believe that TELRIC rates do not cover their costs, the Commission could invite them to file forward-looking cost studies instead. The Commission previously permitted

[141] *See* Declaration of M. Joseph Stith (dated Oct. 4, 2004) (filed in RM-10593 Dec. 7, 2004), Attachment 1 & 2 (comparing, among other things, the different pricing flexibility rates for DS1 and DS3 services BOCs assess in each state).

the BOCs to do this (which the BOCs chose not to do) instead of opting for other alternatives that were available to them.[142]

2. Price cap rules need to be refined

Once special access rates are reinitialized, as previously proposed,[143] the Commission should include all special access rates under a modified price cap regulatory framework.[144] The permanent features of this regulatory framework, which are highlighted below, should include a productivity-based X-factor, revenue sharing, as well as the service baskets and categories proposed by Joint CLECs.[145]

The X-Factor Should be Reapplied. The record fully supports imposing an X factor because BOCs enjoy productivity levels significantly greater than the economy as a whole.[146] Recent data from the Bureau of Labor Statistics further supports using an X factor and shows that for the period from 1996 through 2005, overall U.S. productivity growth averaged 2.8% per year,[147] while the wired telecommunications sector exceeded that by a considerable margin –

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[142] *CALLS Order*, ¶¶ 29, 56-62; *Special Access NPRM*, ¶ 14.

[143] *See* Joint CLECs 6/13/05 Comments at 24-32; Joint CLECs 7/29/05 Reply Comments at 43-55.

[144] This involves bringing all special access services in existing Phase II MSAs back within price caps.

[145] *See* Joint CLECs 6/13/05 Comments at 24-32; Joint CLECs 7/29/05 Reply Comments at 43-55.

[146] Verizon 6/13/05 Comments at 43, n.30; SBC 6/13/05 Comments at 40-42.

[147] United States Department of Labor, Appendix Table 1. Business sector: Revised productivity, hourly compensation, and unit labor costs, and prices, seasonally adjusted, *available at* http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?request_action=wh&graph_name=PR_lprbrief. To arrive at this figure, the average percentage of the reported year-to-year index growth was calculated over the years 1996 through 2006.

growing an average of 4.6%.[148] Because LEC productivity continues to outpace that of the economy as a whole, the Commission should neither set the X-factor at the inflation rate[149] nor reduce it to zero.[150] Such changes would mean that BOC customers would see none of the benefits of productivity gains, which would continue to accrue to the BOCs as monopoly rents.[151]

If anything, the record supports an X factor that is much higher than the 5.3% factor that applied previously. The two X-factor studies undertaken by Ad Hoc's economic consultants, Economics and Technology, Inc. and filed in this proceeding demonstrate that the Commission should adopt an X factor in the range of 10-11 percent.[152] Although the Commission should, at a minimum, apply the X-factor prospectively, it should also apply it retroactively back to 2004,[153] when the Commission, under the CALLS Plan, effectively eliminated the X-factor and froze the Price Cap Index ("PCI").

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[148] United States Department of Labor, Industry Productivity Costs, Wired Telecommunications Carriers, *available at* http://data.bls.gov/cgi-bin/surveymost?ip. To arrive at this figure, the average percentage of the reported year-to-year index growth was calculated over the years 1996 through 2002.

[149] Verizon 6/13/05 Comments at 41-43.

[150] Qwest 6/13/05 Comments at 10.

[151] *See, e.g.* Joint CLECs 6/15/06 Comments at 24-26; T-Mobile 6/13/05 Comments at 21-22; Nextel 6/13/05 Comments at 18-20; Sprint 6/13/05 Comments 12-13.

[152] Ad Hoc 7/29/05 Reply Comments, at 19-23; Ad Hoc 7/29/05 Reply Declaration of Susan Gately, at 4-8.

[153] Since substantial evidence demonstrates that special access rates are unreasonable, such retroactive true-ups would be permissible. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 384, 387-89 (1932) (A carrier charging a merely legal rate (in that it was properly filed) may be subject to refund liability if customers can later show that the rate was unreasonable. Should an agency declare a rate to be lawful, however, refunds are thereafter impermissible as a form of retroactive ratemaking).

Revenue Sharing Should be Re-Imposed. In 1997, the Commission eliminated the sharing requirement based on its predictive judgment that the pace of *expected* competitive entry would obviate the need for sharing;[154] however, this did not turn out to be the case. Sharing is important as a correction for a miscalculated X-factor, and that a "zone" structure like before is appropriate.[155]

The BOCs cannot reasonably argue that they are being deprived of justly earned returns in the sharing zone, because if the market were as competitive as they claim it to be, *they would never have seen this level of return in the first* place. Moreover, whatever incentive the BOCs derive from supra-competitive returns is of no use to carrier consumers if all of the financial benefits of those incentives accrue as windfalls to the BOCs. As the Commission stated in the *LEC Price Cap Order*, "this level of sharing will ensure that consumers receive their fair share of productivity gains that occur, just as they would in an industry with keener competition."[156]

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[154] *1997 Price Cap Review Order*, ¶¶ 150-151 (emphasis supplied).

[155] The undersigned competitive carriers do not propose any sharing thresholds but believe that the thresholds the Commission previously adopted in the *LEC Price Cap Order* are appropriate if the outdated 11.25 percent rate of return is utilized. Specifically, in the *LEC Price Cap Order*, the Commission established three earnings sharing zones based on specific rates of return. *LEC Price Cap Order*, ¶¶ 122-26. In the first zone, price cap LECs were allowed to retain all of their earnings up to the first rate of return ceiling, 12.25 or 13.25 percent, depending on whether the LEC elected a 3.3 or 4.3 percent productivity factor. *LEC Price Cap Order*, ¶¶ 123, 126. In the second zone, price cap LECs were allowed to retain 50 percent and return to ratepayers 50 percent of their earnings between the first ceiling and the second ceiling, 16.25 or 17.25 percent, again depending on whether the LEC elected a 3.3 or 4.3 percent productivity factor. *LEC Price Cap Order*, ¶¶ 124, 126. In the third zone, price cap LECs were required to return 100 percent of any earnings above the second ceiling. *LEC Price Cap Order*, ¶¶ 125-26. If the Commission concludes that the rate of return should be lowered (as it should), the above sharing thresholds should be lowered commensurately. The productivity factors should be increased since the productivity of the wired telecommunications sector is 4.6%, which is far exceeds the overall U.S. productivity growth of 2.6%.

[156] *LEC Price Cap Order*, ¶ 124.

Moreover, without some type of limiting rules, price cap LECs will continue to earn windfall profits indefinitely, perhaps mitigated only by any applicable X-factor.

Baskets and Categories Proposed by Joint CLECs Should Be Adopted. For the reasons provided in 2005 comments,[157] the Commission should modify its current basket and category structure and adopt the Joint CLECs' proposal that establishes separate baskets for DS1 and DS 3 special access services and creates four categories within these baskets: (1) special access channel terminations between the LEC end office and the customer premises (*i.e.*, loops); (2) channel mileage between LEC central offices (*i.e.*, transport); (3) special access channel terminations between the IXC POP and the LEC serving wire center (entrance facilities) and (4) any other special access product related to the basket.[158] High capacity services above the DS-3 level (*e.g.*, OCn) should be placed in a separate basket that does not include categories insofar as the Commission's determination is correct that the market for these services is competitive.[159] Also, other retail services should have their own basket as well.

Moreover, the Commission should also establish a separate basket for mass market broadband and DSL services. As Joint CLECs previously showed,[160] these services compete directly with mass market cable offerings, existing in a duopoly that is currently fiercely price

[157] *See* Joint CLECs 6/13/05 Comments at 28-32; Joint CLECs 7/29/05 Reply Comments at 50-54.

[158] The 5 percent upper pricing band that currently applies to special access services and categories should also apply to the baskets and categories being proposed herein "to protect ratepayers from substantial changes in services rates." *See LEC Price Cap Order,* ¶¶ 223-24; 47 C.F.R. § 61.47(e).

[159] *See, e.g., TRO,* ¶¶ 315 & 389.

[160] *See* Joint CLECs 6/13/05 Comments at 30-31; Joint CLECs 7/29/05 Reply Comments at 51-52.

competitive, unlike traditional special access services.[161] If BOCs want to compete for these mass market customers, they should not be offsetting lower prices for competitive services by assessing higher rates for non-competitive special access services. To prevent such anticompetitive cross subsidization, the costs and revenues associated with mass market broadband and DSL services should be assigned to a separate basket.

As a general matter, implementing certain safeguards that prevent cost shifting from competitive services to non-competitive services is necessary to foster competition for telecommunications services. The Commission has long realized that separation of services into baskets is important. As it explained in the *LEC Price Cap Order,* "[s]ubdividing LEC services into baskets substantially curbs a carrier's pricing flexibility, as well as its ability to engage in unlawful cost shifting between the broad groups of services. Whenever a set of rates is subject to a price ceiling, carriers have no incentive to shift costs into the basket because the cap does not move in response to endogenous cost changes."[162]

Consistent with these Commission observations, the Joint CLECs' proposal appropriately segments the most relevant and recognized special access product markets to preclude cost shifting between such broad groups of services. In addition, the categories proposed for the DS1 and DS3 baskets, which would be subject to rate ceilings, would minimize the BOCs ability to offset rate reductions where there is competition with rate hikes between and among the various categories where there is none. Through such regulation, the Joint CLECs' proposal will protect

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[161] *Special Access NPRM,* ¶ 52.

[162] *LEC Price Cap Order*, ¶ 200.

and hopefully foster competition. For these reasons, the Commission should establish baskets and categories as the Joint CLECs propose.[163]

3. The Commission Should Abolish Phase II Pricing Flexibility

The Commission should abolish Phase II pricing flexibility.[164] The fact that BOCs, as demonstrated above, have been raising prices throughout MSAs where Phase II pricing flexibility has been granted, by itself shows that the Commission's Phase II pricing flexibility tests misidentify where competition is sufficient to constrain prices. If those tests accurately identified where competition could replace regulation as the guarantor of reasonable prices, BOCs would have reduced or maintained prices. In fact, customers have received no benefits from Phase II pricing flexibility. Even if prices have remained the same in some cases, customers have been harmed because service in those areas has not been subject to any X Factor reductions that would have been permitted customers to obtain the benefits of increased technological efficiencies. Phase II pricing flexibility, especially after the expiration of the CALLS plan, has been a huge windfall for price cap ILECs.

[163] To the extent the Commission is disinclined to establish the additional baskets that the undersigned competitive carriers propose (ostensibly out of concerns that the BOCs would not be able to achieve the total company productivity offset for each basket), the Commission should, at a minimum, establish separate "categories" for each of the baskets and "subcategories" for each of the proposed categories . The 5 percent upper pricing band that currently applies to special access service categories and subcategories should apply to these new categories and subcategories so that ratepayers are protected "from substantial changes in service rates." *LEC Price Cap Order*, ¶¶ 223-24; 47 C.F.R. § 61.47(e). The Commission took such an approach in *LEC Price Cap Order*. *Id.*, ¶ 210.

[164] *See* Joint CLECs 6/13/05 Comments at 32-35; Joint CLECs 7/29/05 Reply Comments at 55-57.

BOCs' pricing responses to Phase II pricing flexibility have invalidated the Commission's prediction that relieving special access service from price cap regulation in qualifying MSAs could "lead to higher rates for access to some parts of an MSA that lack a competitive alternative. . . ."[165] The Commission also recognized that "the regulatory relief we grant upon a Phase II showing may enable incumbent LECs to increase access rates for some customers."[166] Price increases that BOCs have been able to implement because of the absence of competitive alternatives has not, however, been confined to "some parts of an MSA" or some customers as the Commission contemplated. Rather, price increases have occurred throughout the MSA qualifying for Phase II pricing flexibility.

The Commission also erroneously believed that Phase II relief was justified because its price cap rules may have required incumbent LECs to price access services below cost in certain areas.[167] If this unsupported 1999 speculation about below cost pricing was ever valid, it since has been invalidated by the astronomical rates-of-return that BOCs are earning on special access service. There is no realistic possibility that BOCs are providing special access service below cost anywhere. Thus, the Commission's concern about the theoretical possibility of below cost pricing does not now, if it ever did, justify a regulatory scheme that permits widespread price increases of the type that BOCs have implemented.

There is no basis, in any event, for a regulatory framework governing special access that permits BOCs to increase prices based on a showing of competition. Competition should put downward pressure on prices. BOCs have no reason to raise prices in response to competition,

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[165] *Pricing Flexibility Order*, ¶ 142.

[166] *Pricing Flexibility Order*, ¶ 155.

[167] *Id.*

except the anticompetitive tactic of raising prices where there is no competition to offset predatory pricing in other areas. Allowing BOCs to raise prices in response to competition has no theoretical basis and invites abuse. The Commission should abolish Phase II pricing flexibility or provide that BOCs may only reduce prices.

C. The Commission Should Find that Volume Discounts May Not Be Subject to Unreasonable and Restrictive Conditions

As noted, the record already demonstrates that BOCs impose unreasonable conditions on volume discounts, including region-wide commitments, conditioning discounts on the level of prior purchases, and limits on the purchase of UNEs or competitors' services.

The Commission should establish, pursuant to Section 201 of the Act, that price cap ILECs may not impose any conditions on volume and term discounts that are not reasonably related to costs or efficiencies of providing volume or term offerings. BOCs should be limited to offering discounts that are tied only to the volume and term purchased. Discounts would be provided on a sliding scale basis as volume and term commitments increased.[168] They should not be based on total company special access commitments to an RBOC or other unreasonable terms such as those the GAO found to inhibit competition or otherwise limits customers' ability to choose another provider. As discussed above, the GAO found, "[t]hese conditions include such things as revenue guarantees, requirements for shifting business away from competitors, and severe termination penalties." "These types of contracts…inhibit choosing competitive alternatives because the customer does not receive the applicable discount, credit, or incentive if the revenue targets are not met and additional penalties may also apply."[169] As the GAO

[168] *See* Comments of AT&T Corp., WC Doc. 05-25, at 7 (filed June 13, 2005).

[169] GAO Report at 30.

concluded, "[u]nless a competitor can meet the customer's entire demand, the customer has an incentive to stay with the incumbent and to purchase additional circuits from the incumbent, rather than switch to a competitor or purchase a portion of their demand from a competitor—even if the competitor is less expensive."[170]

The bottom line is that the Commission should conclude these unreasonable BOC contracts are unlawful because they inhibit customer choice and competition. By rendering such a decision, the Commission would promote the provision of the most cost-effective and innovative services because customers would be free to move to other special access providers based on better price or superior technology instead of being locked in by non-cost-based terms and conditions.

D. The Commission Should Adopt a "Fresh Look"

Assuming that the Commission determines that BOCs may not impose conditions on discounts that are not reasonably related to costs or possible efficiency gains, it should also establish a fresh look so that customers locked in by current unreasonable BOC tariffs or contracts may choose another provider. Absent a fresh look opportunity, BOCs will essentially be able obtain the benefit of anticompetitive conditions for an extended period of time throughout their regions, thwarting the Commission's determination that those conditions are unreasonable and unlawful. An effective fresh look opportunity must permit customers to terminate a contract without penalties. The fresh look opportunity should be at the sole election of the customer. The BOC should not have the option to terminate existing contracts because it could use this option to harm customers by imposing on them in an arbitrary fashion the burdens

[170] GAO Report at 30.

of undertaking new contract negotiations and/or finding alternative providers. Accordingly, the Commission should determine that customers, at their election, may choose to terminate service without penalties. Commenters suggest a fresh look period for this purpose of one year during which customers may, without incurring penalties, choose an alternative provider or negotiate a new arrangement with the BOC.

V. CONCLUSION

The Commission should promptly grant the requested relief.

Respectfully submitted,

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Penn Telecom, Inc.
RCN Telecom Services, Inc.
SAVVIS, INC.
U.S. Telepacific Corp. d/b/a
Telepacific Communications

Dated: August 8, 2007

ATTACHMENT 1

DECLARATION OF DON EBEN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

DECLARATION OF DON EBEN

1. My name is Don Eben. I am Director of Network Planning of McLeodUSA Telecommunications Services ("McLeodUSA"). My business address is 15 E. 5th Street, Suite 1600, Tulsa, OK 74103. I joined McLeodUSA in April 2001. I have more than 11years experience in Network Planning and Engineering with responsibilities including contract negotiations, cost management, and network architecture. I have factual knowledge relating to the information discussed in this Declaration.

2. I am responsible for Access Planning and implementation. As part of my responsibilities, I have been personally involved in overseeing efforts to implement McLeodUSA's policy to build loop and other facilities where economically possible, or to obtain them from non-ILEC providers where available. The purpose of this declaration is to demonstrate the lack of alternatives to BOC facilities to the vast majority of end user customer locations.

3. Wherever possible, McLeodUSA seeks to rely on its own facilities for provision of service. McleodUSA has invested over $ 3 billion in network facilities including switches, transport facilities, long-haul fiber, and in rare instances, OCn loops to customer premises. McLeodUSA has either built these facilities or acquired them from other carriers.

4. It is my experience that it is rarely economically feasible for McLeodUSA to build the last mile connections (*i.e.*, loops) at the DS0, DS1, or DS3 capacity level to individual premises. The revenue that can be derived from the required investment in such facilities will, in all but a few rare exceptions, not be adequate to recoup the investment costs and provide a return on that investment. Moreover, even in the rare instance where it may be economically feasible to make the initial investment to serve a particular premise, the difficulty in obtaining the necessary rights of way or building access permission in a timely manner to accomplish the construction of the direct connection creates another insurmountable barrier.

5. Where it is economically infeasible to construct facilities, McLeodUSA has a preference to obtain facilities from competitive providers. McLeodUSA will purchase services from ILECs only as a last alternative. However, it is my experience in every market in which it operates that McLeodUSA is never able to obtain raw copper facilities to any customer location from competitive providers. I am also not aware that McLeodUSA is able to obtain DS0 level loop facilities to premises from any competitive providers. McLeodUSA is able to obtain DS1 and DS3 level access from competitors to no more than 5% of customer locations. Where McLeodUSA is unable to construct facilities, or obtain them from competitors, McLeodUSA must obtain them from ILECs either as UNEs or special access. McLeodUSA is dependent on reasonably priced ILEC facilities for access to customer locations in the vast majority of situations.

6. For reasons stated in my declaration in WC Docket No. 04-223, ILEC special access and "commercial" offerings do not provide a realistic business alternative for obtaining most transport and loop facilities.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed August 6, 2007

Don Eben

ATTACHMENT 2

DECLARATION OF KEVIN ALBAUGH

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

DECLARATION OF KEVIN J. ALBAUGH

1. My name is Kevin J. Albaugh. I am Vice President, Regulatory of Penn Telecom, Inc. My business address is 4008 Gibsonia Road, Gibsonia, Pennsylvania 15044. I joined Penn Telecom in 1996. I have over 30 years of experience in the telecommunications industry. During that time I have held management positions of increasing responsibility in the area of sales, rates and tariffs, revenue requirements, intercompany relations and regulatory policy. During that period, I was employed by a number of incumbent local exchange carriers including Mid-Continent Pennsylvania, Alltel-Northeast Region and finally North Pittsburgh Telephone Company (NPTC). NPTC is an affiliate of Penn Telecom, Inc. At NPTC I am also the Vice President of Regulatory Affairs with duties similar to those that I provide for Penn Telecom, Inc. I have factual knowledge relating to the information discussed in this Declaration.

2. Penn Telecom is an edge-out CLEC that operates exclusively in the Pittsburgh MSA. The company is headquartered in Cranberry Twp., PA and employs 125 people. Our product portfolio includes traditional local and long distance service, 800 service, calling cards, PRIs, DSL, Internet access, broadband data, Metro-Ethernet and VoIP. Penn Telecom's primary

focus is on the small and medium enterprise space as well as a limited number of MDU developments.

3. Penn Telecom's value proposition is based on the fact that we are committed to providing quality telecommunications services in a single market at competitive prices. Through our association with our affiliate the incumbent local exchange carrier (ILEC) North Pittsburgh Telephone Company, we have been able to implement our edge-out strategy as we build out our network in a cost effective manner. By initially purchasing certain services, such as switching capability, from our ILEC affiliate, we have been able to leverage our ILEC affiliate's 100 year telecom legacy to establish ourselves as the home-town intramodal choice for competitive business services in the Pittsburgh metro market. Our high quality bundled voice and broadband data networking capabilities, especially our Metro-Ethernet services, are relatively unique in this market.

4. **[Begin Confidential] *** [End Confidential]** In those instances when unbundled network elements are unavailable, Penn Telecom will order the element via Special Access, but at a much greater cost.

5. **[Begin Confidential] *** [End Confidential]** The Pittsburgh MSA covers seven counties in Southwestern Pennsylvania. According to the U.S. Census Bureau 2002 Survey of Business Owners, there are 46,756 "employer firms" within the MSA. Penn Telecom's existing network does not cover the entire MSA, but does encompass those areas that have the most dense concentration of the business market that we address. Our focus is on the over 30,000 potential "employer firms" exist within the footprint of our operation. Since the Census Bureau defines an "employer firm" as one with a payroll, and therefore employees, we assume this category to be a fair indicator of the small and medium enterprise market in the Pittsburgh

MSA and therefore our potential addressable customer base. Even though Penn Telecom has chosen to serve those areas in the Pittsburgh Metro market that are most densely populated, still our customers are scattered across a large geography, resulting in a much lower density of customers served per square mile than that experienced by Verizon whose facilities benefit from being ubiquitous. This resulting low-density service market is not conducive to the economical construction of alternative facilities, especially by a single provider.

6. **[Begin Confidential] *** [End Confidential]**

7. **[Begin Confidential] *** [End Confidential]** Due to the highly competitive nature of the intramodal market and Verizon's ability to charge lower retail rates than the wholesale rates that Verizon has quoted to Penn Telecom for essentially the same facility, it would be impossible for Penn Telecom to recoup these increases through increases in retail pricing to end users. The competitive market has driven the retail prices down to the point that the cost of a single special access facility would exceed the total revenue available from most of the customers that we serve via DS-1 facilities. Except for the last mile loop bottleneck facilities that are owned and provisioned by Verizon and for which Verizon is able to charge exorbitant rates if unchecked by this Commission, there are no excessive margins in the Pittsburgh voice and broadband markets, especially with the prevalence of flat-rate, unlimited calling plans. Should Verizon be successful in eliminating intramodal CLEC access to these last mile local loop and DS-1 facilities at the lower unbundled network element rates, it is certain that Penn Telecom as well as other CLECs operating in the Pittsburgh Metro area would be unable to maintain any level of profitability while absorbing the drastically increased costs. Consequently Penn Telecom would be forced to scale back significantly, ceasing to serve most if not all of our small and medium enterprise customers. The result would be that these customers would no longer have

any viable choice other than Verizon for their voice and broadband services, essentially forcing them back to the single option of Verizon's retail services at higher rates.

8. Based on my experience at Penn Telecom and in the telecommunications industry, it will take some time for a fully competitive facilities-based environment to develop with more than two large players in each MSA. The capital costs necessary to achieve a truly independent network are staggering. While the costs of technology for both switching and transport do continue to decline, the market still lacks a viable alternative access network provider that can offer ubiquitous access over last mile loop facilities that will reach 100% of the addressable market. Obviously the most efficient approach is a neutral provider who can share the costs among many buyers. The requirement that Verizon continue to offer reasonably priced access to the unbundled loop and DS-1 facilities in the Pittsburgh market is a viable alternative in the meantime, until facilities based competitors can reach the scale necessary to serve the entire market.

9. The typical small business customer served by PTI has seen his or her rates for telecommunications services plunge by 20-50% since the introduction of competition in the Pittsburgh Metro market. This competition, however, is only viable in the small and medium enterprise space through the continued availability of the incumbent Verizon last-mile facilities at TELRIC justified prices. It is Penn Telecom's experience that the vast majority of the small and medium enterprise market is reachable only by reasonable access over Verizon facilities. Absent reasonable terms for access to Verizon last mile bottleneck facilities, Penn Telecom would be forced to cease providing service to many of our small customers, robbing them of any competitive choice.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed August 7, 2007

Kevin J. Albaugh

ATTACHMENT 3

DECLARATION OF STEVEN H. BROWNWORTH

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

DECLARATION OF STEVEN H. BROWNWORTH

1 My name is Steven H. Brownworth. I am Vice-President, Systems Planning of Deltacom, Inc., an operating company and a wholly-owned subsidiary of ITC^DeltaCom, Inc. My business address is 7037 Old Madison Pike, Huntsville, AL 35806. I joined Deltacom in 1994. I have more than 20 years experience in implementation of competitive networks, cost of services and capital planning. have factual knowledge relating to the information discussed in this Declaration.

2. I am responsible for the budget and results of capital programs and cost of sales as well as negotiations and vendor management of our service providers, including ILECs, CAPs and CLECs. Additionally, I am involved with the overall business and financial planning of Deltacom. As part of my responsibilities, I have been personally involved in overseeing efforts to implement Deltacom policy to build loop and other facilities where economically possible or to obtain them from non-ILEC providers where available. The purpose of this declaration is to demonstrate the lack of alternatives to ILEC facilities to the vast majority of end-user customer locations.

3. Wherever economically possible, Deltacom seeks to rely on its own facilities for provision of service. ITC^Deltacom has invested hundreds of millions of dollars in network facilities including switches, data network, inter-city transport facilities, and OCn transport to ILEC central offices and to other service providers. Deltacom has either built its facilities or acquired them from other carriers. It is my experience that it is never economically feasible for Deltacom to build loops at the DS0, DS1, or DS3 capacity level because, while we offer a diverse array of services in over nine states in the Southeastern US, the revenue (volume and term) opportunities to an individual location are insufficient to justify the costs.

4. Where it is economically infeasible to construct facilities, Deltacom prefers to obtain facilities from competitive providers. Deltacom will purchase services from ILECs in order to meet the ILEC revenue/volume commitments, and the incumbent is the vendor of last resort on DS3 and higher facilities. However, it is my experience in every market in which it operates that Deltacom is never able to obtain raw copper facilities or DS0 level access to any customer location from competitive provider networks. Deltacom is able to obtain DS1 and DS3 level access from competitors to no more than 10% of customer locations.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed August 8, 2007

Steve H Brownworth

Steven H. Brownworth

ATTACHMENT 4

COMPARISON OF QWEST PRICING FLEXIBILITY, PRICE CAP AND UNE RATES

Comparison of Qwest Pricing Flexibility, Price Cap, and UNE Rates

Cost of 10-mile Sample Circuit with 2 Channel Terminations
(Rates in Effect 7/13/07)

REDACTED – FOR PUBLIC INSPECTION

Qwest	Price Cap Rates 1 year term	Price Flex Rates 1 year term	% Difference 1 year term	Price Cap Rates 3 year term	Price Flex Rates 3 year term	% Difference 3 year term
DS1						
Zone 1	$382.80	$551.00	43.9%	$349.56	$465.00	33.0%
Zone 2	$397.70	$571.00	43.6%	$365.30	$485.00	32.8%
Zone 3	$421.50	$589.00	39.7%	$389.40	$505.00	29.7%
Zone 4						
Zone 5						
DS3						
Zone 1	$3,386.40	$5,620.00	66.0%	$3,046.68	$4,650.00	52.6%
Zone 2	$3,386.40	$5,620.00	66.0%	$3,046.68	$4,650.00	52.6%
Zone 3	$3,386.40	$5,620.00	66.0%	$3,046.68	$4,650.00	52.6%
Zone 4						
Zone 5						

Qwest	Arizona UNES	Minnesota UNES	Colorado UNES	Iowa UNES	Washington UNES	Average UNEs
DS1						
Zone 1	$180.17	$154.93	$149.33	$362.13	$177.34	$204.78
Zone 2	$181.11	$167.11	$163.29	$367.77	$178.44	$211.54
Zone 3	$197.51	$173.73	$207.89	$397.79	$177.78	$230.94
Zone 4		$173.73			$177.54	$175.64
Zone 5					$188.28	$188.28
DS3						
Zone 1	$1,883.30	$1,667.79	$1,541.42	$2,259.33	$1,832.77	$1,836.92
Zone 2	$1,904.70	$1,680.09	$1,649.46	$2,409.55	$1,857.81	$1,900.32
Zone 3	$2,270.80	$1,672.09	$1,994.62	$3,126.29	$1,842.65	$2,181.29
Zone 4		$1,878.69			$1,837.31	$1,858.00
Zone 5					$2,081.55	$2,081.55

Qwest	% Diff Price Cap 1 Yr term v. UNE Avg.	% Diff Price Flex 1 Yr term v. UNE Avg.	% Diff Price Cap 3 Yr term v. UNE Avg.	% Diff Price Flex 3 Yr term v. UNE Avg.
DS1				
Zone 1	86.93%	169.07%	70.70%	127.07%
Zone 2	88.00%	169.92%	72.68%	129.27%
Zone 3	82.51%	155.04%	68.62%	118.67%
Zone 4				
Zone 5				
DS3				
Zone 1	84.35%	205.95%	65.86%	153.14%
Zone 2	78.20%	195.74%	60.32%	144.70%
Zone 3	55.25%	157.65%	39.67%	113.18%
Zone 4				
Zone 5				

REDACTED – FOR PUBLIC INSPECTION

Comparison of Qwest Pricing Flexibility, Price Cap, and UNE Rates

TARIFF CALCULATIONS AND SOURCES

	1 YEAR						1 YEAR					
	Price Cap Zones					Qwest Tariff	Price Flex Zones					Qwest Tariff
	1	2	3	4	5	FCC No. 1	1	2	3	4	5	FCC No. 1
Qwest DS1 (AZ, CO, IA, & WA):												
Channel Term. x 2	$217.90	$232.80	$256.60			Page 7-347	$312.00	$332.00	$350.00			Page 17-91
Channel Mileage Term. Fixed	$67.90	$67.90	$67.90			Page 7-354.2	$89.00	$89.00	$89.00			Page 17-98.2
Channel Mileage x 10 miles	$97.00	$97.00	$97.00			Page 7-354.2	$150.00	$150.00	$150.00			Page 17-98.2
TOTAL:	$382.80	$397.70	$421.50				$551.00	$571.00	$589.00			
Qwest DS3 (AZ, CO, IA, & WA):												
Channel Term. x 2	$2,688.00	$2,688.00	$2,688.00			Page 7-403	$4,200.00	$4,200.00	$4,200.00			Page 17-122
Channel Mileage Term. Fixed	$320.10	$320.10	$320.10			Page 7-412	$600.00	$600.00	$600.00			Page 17-132
Channel Mileage x 10 miles	$378.30	$378.30	$378.30			Page 7-412	$820.00	$820.00	$820.00			Page 17-132
TOTAL:	$3,386.40	$3,386.40	$3,386.40				$5,620.00	$5,620.00	$5,620.00			
	3 YEARS						3 YEARS					
	Price Cap Zones					Qwest Tariff	Price Flex Zones					Qwest Tariff
	1	2	3	4	5	FCC No. 1	1	2	3	4	5	FCC No. 1
Qwest DS1 (AZ, CO, IA, & WA):												
Channel Term. x 2	$205.06	$220.80	$244.90			Page 7-347	$260.00	$280.00	$300.00			Page 17-91
Channel Mileage Term. Fixed	$59.50	$59.50	$59.50			Page 7-355	$85.00	$85.00	$85.00			Page 17-99
Channel Mileage x 10 miles	$85.00	$85.00	$85.00			Page 7-355	$120.00	$120.00	$120.00			Page 17-99
TOTAL:	$349.56	$365.30	$389.40				$465.00	$485.00	$505.00			
Qwest DS3 (AZ, CO, IA, & WA):												
Channel Term. x 2	$2,398.68	$2,398.68	$2,398.68			Page 7-403	$3,400.00	$3,400.00	$3,400.00			Page 17-122
Channel Mileage Term. Fixed	$297.00	$297.00	$297.00			Page 7-416	$500.00	$500.00	$500.00			Page 17-138
Channel Mileage x 10 miles	$351.00	$351.00	$351.00			Page 7-416	$750.00	$750.00	$750.00			Page 17-138
TOTAL:	$3,046.68	$3,046.68	$3,046.68				$4,650.00	$4,650.00	$4,650.00			

Comparison of Qwest Pricing Flexibility, Price Cap, and UNE Rates

Qwest UNE Calculations and Sources

Qwest Arizona

	DS1			DS3		
Zones	1	2	3	1	2	3
Loops x 2	$134.78	$135.72	$152.12	$1,478.14	$1,499.54	$1,865.64
IO Transport						
Fixed	$35.99	$35.99	$35.99	$246.16	$246.16	$246.16
Per-Mile	$0.9400	$0.9400	$0.9400	$15.9000	$15.9000	$15.9000
Miles	10	10	10	10	10	10
Totals	$180.17	$181.11	$197.51	$1,883.30	$1,904.70	$2,270.80

Qwest Minnesota

	DS1				DS3			
Zones	1	2	3	[redacted]	1	2	3	[redacted]
Loops x 2	$54.28	$66.46	$73.08	$91.22	$1,199.62	$1,211.92	$1,203.92	$1,410.52
IO Transport								
Fixed	100.65	100.65	100.65	100.65	87.97	87.97	87.97	87.97
Per-Mile	0.00	0.00	0.00	0.00	38.02	38.02	38.02	38.02
Miles	10	10	10	10	10	10	10	10
Totals	$154.93	$167.11	$173.73	$191.87	$1,667.79	$1,680.09	$1,672.09	$1,878.69

Qwest Colorado

	DS1			DS3		
Zones	1	2	3	1	2	3
Loops x 2	$110.54	$124.50	$169.10	$1,216.28	$1,324.32	$1,669.48
IO Transport						
Fixed	$26.52	$26.52	$26.52	$176.21	$176.21	$176.21
Per-Mile	$1.2270	$1.2270	$1.2270	$14.8928	$14.8928	$14.8928
Miles	10	10	10	10	10	10
Totals	$149.33	$163.29	$207.89	$1,541.42	$1,649.46	$1,994.62

Qwest Iowa

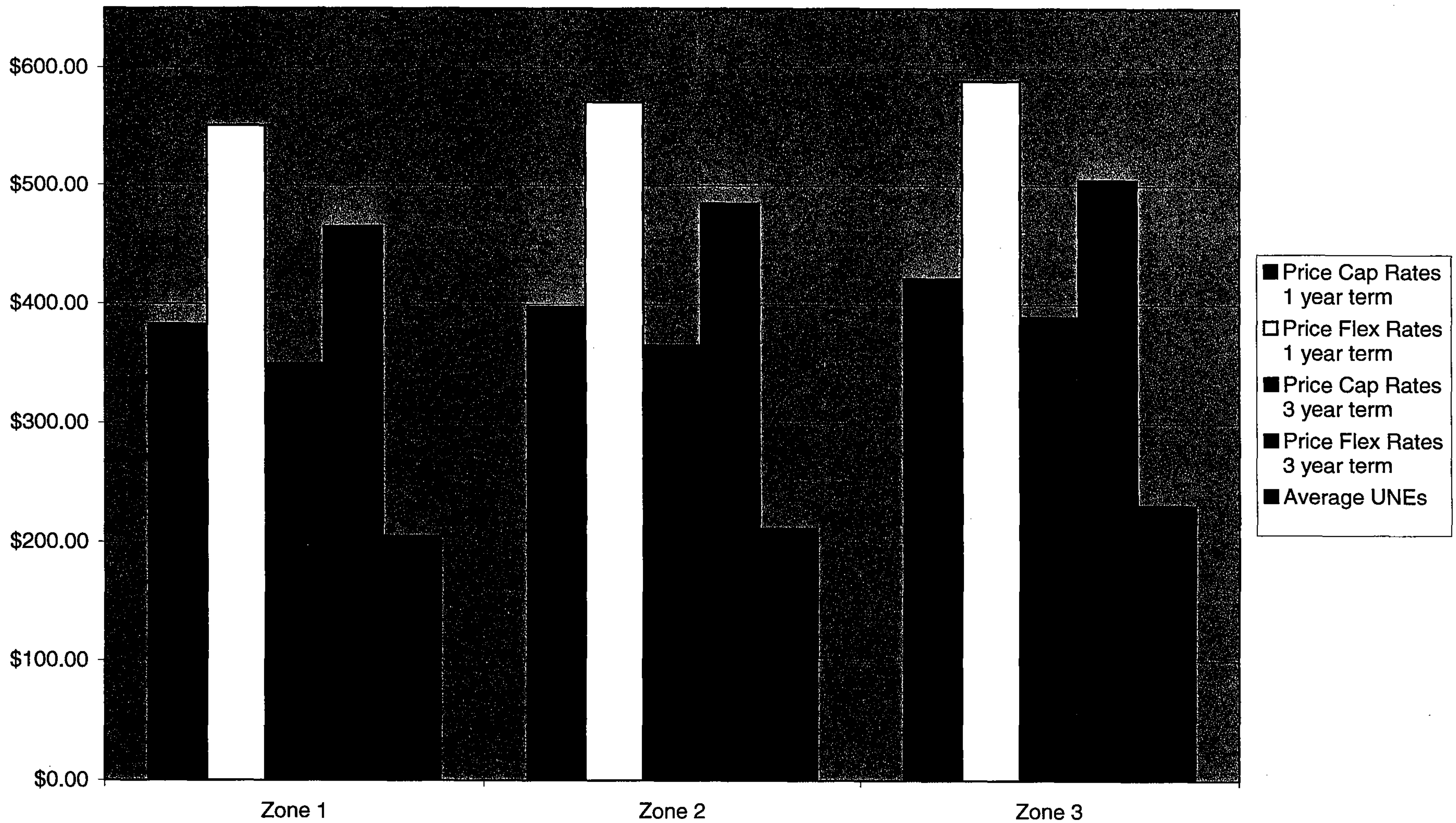
	DS1			DS3		
Zones	1	2	3	1	2	3
Loops x 2	$171.84	$177.48	$207.50	$1,863.48	$2,013.70	$2,730.44
IO Transport						
Fixed	$190.29	$190.29	$190.29	$222.65	$222.65	$222.65
Per-Mile	$0.0000	$0.0000	$0.0000	$17.3200	$17.3200	$17.3200
Miles	10	10	10	10	10	10
Totals	$362.13	$367.77	$397.79	$2,259.33	$2,409.55	$3,126.29

Qwest Washington

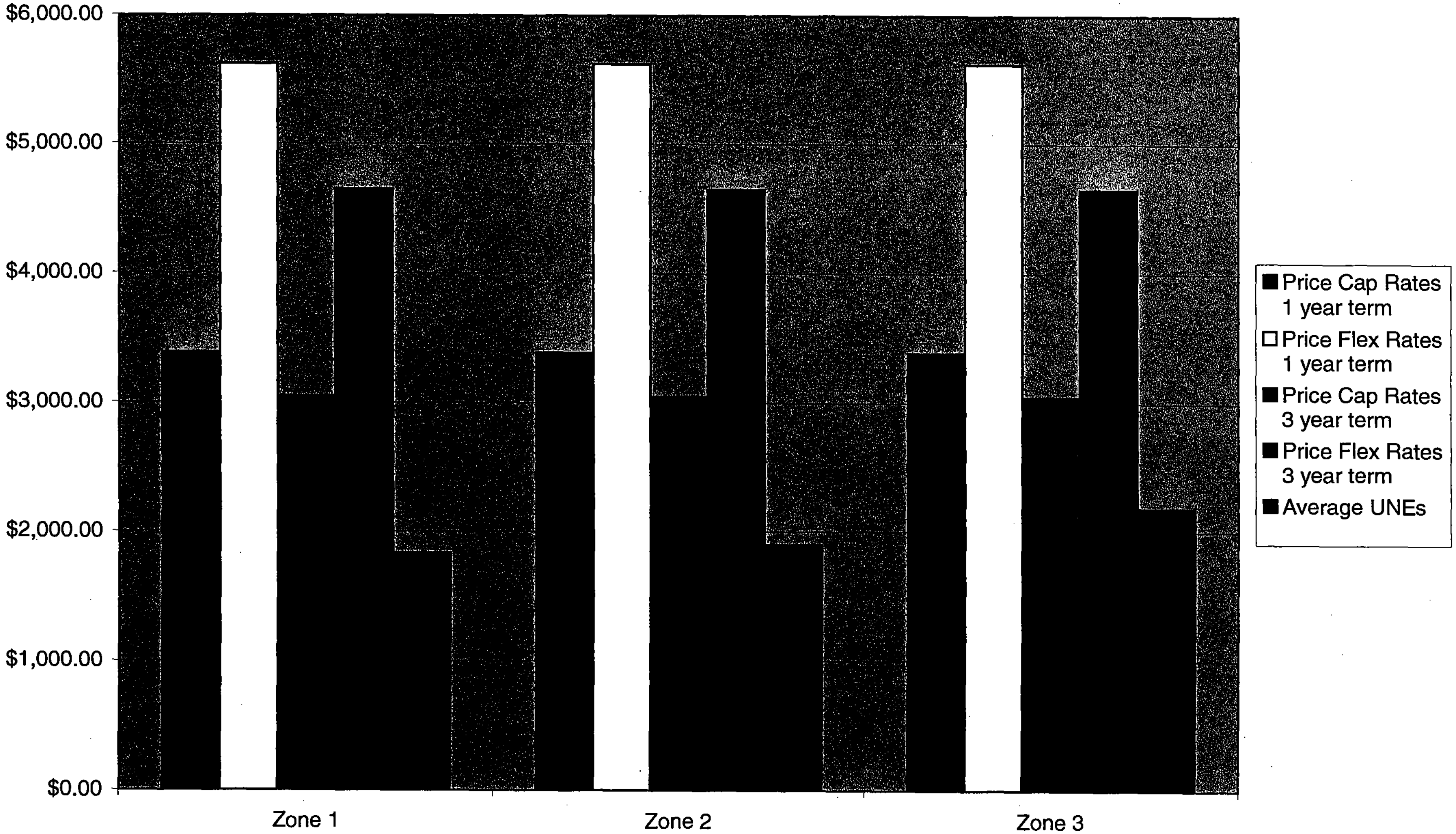
	DS1					DS3				
Zones	1	2	3	[redacted]	[redacted]	1	2	3	[redacted]	[redacted]
Loops x 2	$137.72	$138.82	$138.16	$137.92	$148.66	$1,491.86	$1,516.90	$1,501.74	$1,496.40	$1,740.64
IO Transport										
Fixed	$33.12	$33.12	$33.12	$33.12	$33.12	$225.41	$225.41	$225.41	$225.41	$225.41
Per-Mile	$0.6500	$0.6500	$0.6500	$0.6500	$0.6500	$11.5500	$11.5500	$11.5500	$11.5500	$11.5500
Miles	10	10	10	10	10	10	10	10	10	10
Totals	$177.34	$178.44	$177.78	$177.54	$188.28	$1,832.77	$1,857.81	$1,842.65	$1,837.31	$2,081.55

Sources
Qwest-Arizona SGAT, available at http://www.qwest.com/about/policy/sgats/SGATSdocs/arizona/AZ_14th_Rev_3rd_Amend_Exh_A_2_10_05_Clean.pdf
Qwest-Minnesota SGAT, available at http://www.qwest.com/about/policy/sgats/SGATSdocs/minnesota/MN_Ex_A_3rd_Rev_5th_Amend_040805_Clean.pdf
Qwest-Colorado SGAT, available athttp://www.qwest.com/about/policy/sgats/SGATSdocs/colorado/CO_9th_Rev_2nd_Amended_Exh_A_2_15_05_Clean.pdf
Qwest-Iowa SGAT, available at http://www.qwest.com/about/policy/sgats/SGATSdocs/iowa/Iowa_6th_Revised_4th_Amended_Exh_A_2_15_05_Clean.pdf
Qwest-Washington SGAT, available at http://www.qwest.com/about/policy/sgats/SGATSdocs/washington/WA_8th_Rev_9th_Amended_Exh_A_2_15_05_Clean.pdf

Qwest DS1 Price Cap v. Price Flex v. Avg. UNE
1yr and 3 yr Terms



Qwest DS3 Price Cap v. Price Flex v. Avg. UNE
1yr and 3 yr Terms



ATTACHMENT 5

LIST OF VARIOUS STATE COMMISSION DECISIONS IN THE NORTHEAST DISCUSSING SECTION 271

Attachment 5
LIST OF VARIOUS STATE COMMISSION DECISIONS IN THE NORTHEAST DISCUSSING SECTION 271

[illegible]	[illegible]
District of Columbia	*Petition of Verizon Washington, DC Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 TAC-19*, Recommended Decision, ¶¶ 265-69 (issued Sep. 6, 2005), Commission Order, ¶¶ 90-92, 2005 D.C. PUC LEXIS 257, at *80-83 (D.C. P.S.C. Dec. 15, 2005)
Delaware	*In the Matter of the Application of Verizon Delaware, Inc., for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Delaware Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order (filed February 20, 2004)*, PSC Doc. No. 04-68, Arbitration Award, ¶ 220 (issued Mar. 24, 2006), *aff'd, amended or modified in part and remanded for resolution of remaining issues*, Commission Order No. 7144 (Del. P.S.C. Mar. 20, 2007)
Maine	*Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order Part II at 12-15 & 21, 2004 Me. PUC LEXIS 291, at *25-32 & *44-45 (Me. P.U.C. Sep. 3, 2004), Order at 6, 2005 Me. PUC LEXIS 74, at *24 (Me. P.U.C. Mar. 17, 2005), Order at 19-21, 23-24, 30, 33, 38, 40, 43-44, 2005 Me. PUC LEXIS 267, at *46-47, *49-51, *57-58, *72-73, *78-79, *80-81, *90-91, *92-93, *96-97, *103-106 (Me. P.U.C. Sep. 13, 2005); *aff'd, Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 441 F. Supp. 2d 147 (D. Me. July 18, 2006), *appeal pending, Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, No. 06-2151, (1st Cir. filed Jul. 19, 2006)
Massachusetts	*Complaint of CTC Communications Corp. against Verizon Massachusetts regarding Provisioning of Unbundled Network Elements at Tariffed Rates*, D.T.E. 04-87-B, Order on Motions for Reconsideration and Relief of Verizon Massachusetts and Order on Cost Recovery for Non-Tariffed Services, 2007 Mass. PUC LEXIS 1, at *13-14 (Mass. D.T.E. Jan. 17, 2007) *Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, DTE 04-33, Arbitration Order, at 261-62 (Mass. D.T.E. July 14, 2005) *Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers; Investigation by the Department of Telecommunications and Energy on its own motion as to the propriety of the rates and charges set forth in the following tariff: M.D.T.E.*

Attachment 5
LIST OF VARIOUS STATE COMMISSION DECISIONS IN THE NORTHEAST DISCUSSING SECTION 271

State	[illegible]
	No. 17, filed with the Department on June 23, 2004 to become effective on July 23, 2004 by Verizon New England, Inc. d/b/a Verizon Massachusetts, D.T.E. 03-60/04-73, Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17, at 72-73 (Mass. D.T.E. Dec. 14, 2004)
Maryland	*In the Matter of the Petition of Verizon Maryland Inc. for Consolidated Arbitration of an Amendment to InterconnectionAgreements of Various Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers Pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 9023, Order No. 80958 at 101, 2006 Md. PSC LEXIS 15, at *153-54 (Md. P.S.C. July 31, 2006)
New Hampshire	*See Proposed Revisions to Tariff NHPUC No. 84 (Statement of Generally Available Terms and Conditions); Petition for Declaratory Order re Line Sharing)*, Docket Nos. DT 03-201 and 04-176 (consolidated), Order No. 24,442, Order Following Brief at 41-50, 2005 N.H. PUC LEXIS 24, at *61-75 (N.H. P.U.C. Mar. 11, 2005) and *Verizon New Hampshire Wire Center Investigation, Verizon New Hampshire Revisions to Tariff 84*, DT 05-083 and DT 06-012 (consolidated), Order No. 24, 598, Order Classifying Wire Centers and Addressing Related Matters at 46, 2006 N.H. PUC LEXIS 23, at *74 (N.H. P.U.C. Mar. 10, 2006) *rev'd in part, Verizon New England, Inc. v. N.H. Pub. Utils. Comm'n*, No. 05-CV-94-PB, 2006 U.S. Dist. LEXIS 59339 (D. N.H. 2006), *appeal pending, New Hampshire Public Utilities Comm'n v. Verizon New England, Inc.*, No. 06-2429 (1st Cir. filed Sep. 21, 2006).
New Jersey	*Petition of Verizon New Jersey Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers in New Jersey Pursuant to Section 252 of the Communications Act Of 1934, as Amended, the Triennial Review Order and the Triennial Review Remand Order*, Docket No. TO05050418, Recommended Decision at 85-86 (issued Dec. 1, 2005), Arbitrator's Decision on Exceptions at 25 (issued Jan. 3, 2005), Board Order at 14, 2006 N.J. PUC LEXIS 25, at *35-36 (N.J. B.P.U. Mar. 27, 2006)
Pennsylvania	*Petition of Verizon Pennsylvania Inc. and Verizon North Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Pennsylvania Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, P-00042092, Recommended Decision at 124-25 (issued Aug. 31, 2005), Commission Opinion and Order at 150, 2006 Pa. PUC LEXIS 23, at *208 & *423 (Pa. P.U.C. Feb 21, 2006)
Rhode Island	*Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commerical Mobile Radio Service Providers in Rhode Island to Implement the Triennial Review Order and*

Attachment 5
LIST OF VARIOUS STATE COMMISSION DECISIONS IN THE NORTHEAST DISCUSSING SECTION 271

[illegible]	[illegible]
	Triennial Review Remand Order, Doc. No. 3588, Arbitration Decision, at 6 (issued Nov. 10, 2005), *aff'd*, Commission Order No. 18522, at 3-7, 2006 R.I. PUC LEXIS 8, at *4-12 (R.I. Feb. 1, 2006) *Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18*, Doc. No. 3662, Order No. 18310, at 9-10, 2005 R.I. PUC LEXIS 26, at *15-16 (R.I. P.U.C. July 28, 2005)
Vermont	*Petition of Verizon New England, Inc., d/b/a/ Verizon Vermont, for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Vermont, Pursuant to Section 252 of the Communications Act, as amended, and the Triennial Review Order*, Docket 6932, at 264, 2006 Vt. PUC LEXIS 27, at *511-512 (VT P.S.B. Feb. 27, 2006)