

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

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

REPLY COMMENTS OF COMPTTEL

The Bell Companies claim, in their initial round of supplemental comments, that they face substantial competition in the special access market. They allege that there is competitively deployed fiber where demand is highest, and that cable and fixed wireless services present viable competition to their special access service. Notably they do not, however, provide evidence of their loss in market share resulting from this supposed competition. Indeed, the comments of purchasers of special access belie their claims. The purchasers' comments, instead, provide evidence of continued - and even increased - dependency on the ILECs. In particular,

- o "PAETEC Communications' *dependence on ILEC special access services has risen further, and it now exceeds 98 percent in Phase II areas...*in spite of vigorous and concentrated efforts by PAETEC to find alternative special access providers."¹

¹ Comments of PAETEC Communications at 5-6 ("*PAETEC*")(emphasis added). PAETEC further states that "[t]his development is a direct result of the lack of competitive alternatives now that the BOCs have swallowed the country's largest competitive access providers, and AT&T and BellSouth have merged." *Id.*

- Time Warner Telecom relies “...on the ILECs’ local transmission facilities to reach more locations *than was the case in the past.*”² “In fact in TWTC’s experience, BellSouth and AT&T own the *only* loops serving most of the[] commercial buildings [to which TWTC cannot and has not deployed its own loops] in their respective territories.”³
- AdHoc Telecommunications Users Committee Members “report that their experience in today’s special access marketplace is not different [from when it reported few competitive alternatives for their exchange and exchange access service requirements.]”⁴ “When business users require dedicated voice and data connections from the places of work to the world more than *nine times out of ten* the only provider available to offer that connection is an ILEC.”⁵
- The American Petroleum Institute reports that for its corporate member companies “the price cap *ILECs remain the predominant providers in all of the major special access service categories.*”⁶
- “T-Mobile continues to depend on the ILECs for special access services throughout the United States.”⁷
- According to BT Americas, even the largest CLECs often do not submit bids, at least not viable bids, for many of the sites in a BT RFP.⁸

² Comments of Time Warner Telecom and One Communications at 12 (“*TWTC/One*”)(emphasis added). TWTC states that it serves only approximately a fourth of its customers’ buildings using its own facilities and cannot deploy its facilities to most or all of its customer’s new locations, thus causing an increase in reliance on the ILEC. *Id* at 11-12.

³ *Id*, Taylor Declaration at 2.

⁴ Comments of AdHoc Telecommunications Users Committee (“*AdHoc*”) at 7-8.

⁵ *AdHoc*, Appendix 1, “Special Access Overpricing and the US Economy”, by Economics and Technology, Inc., at 2 (emphasis added).

⁶ Comments of American Petroleum Institute at 6 (emphasis added).

⁷ Comments of T-Mobile at 6.

⁸ Comments of BT Americas at 17 (“*BT*”).

- According to Global Crossing, “[o]nly the incumbent carriers are able to provide service ubiquitously throughout their service territory.”⁹
- “Sprint Nextel relied on incumbent LECs special access services for 96.4% of all DS1 and DS3 customer terminating circuits (including circuits terminating at cell sites) in the top 50 MSAs in 2006... In Phase II price flexibility areas: 97.2% of all Sprint Nextel’s DS1s were purchased from the incumbent LEC.”¹⁰

Even competitive carriers that rely primarily on TELRIC-priced unbundled network elements (“UNEs”) continue to rely on ILEC last mile transmission facilities now as much as ever, and that portion that is special access (rather than UNEs) is necessarily increasing due to implementation of the Triennial Review Remand Order:¹¹

- One Communications relies “on the ILEC for virtually all of its off-net facilities.”¹² “One Communications has only deployed loop facilities to no more than a handful of locations in nearly all of its markets.”¹³
- “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.”¹⁴

⁹ Comments of Global Crossing, Fischer Declaration at 2 (“*Global Crossing*”).

¹⁰ Comments of Sprint Nextel at 30 (“*Sprint Nextel*”). “Even in large urban areas, Sprint Nextel remains dependent on incumbent LEC special access to meet its DS1 and DS3 needs. For example, in 2006, 98% of Sprint Nextel’s DS1 and DS3 circuits in Chicago were purchased from AT&T; 97% of Sprint Nextel’s DS1 and DS3 circuits in Boston were purchased from Verizon; and 99% of Sprint Nextel’s DS1 and DS3 circuits in San Francisco were purchased from AT&T.” *Id.*

¹¹ *In the Matter of Unbundled Access to Incumbent LEC Networks*, Order on Remand, WC Docket No. 04-313 (2005). It is noteworthy, that current comparisons of special access prices to cost-based UNEs show special access rates are significantly higher than the UNE rates. See Comments of XO Communications *et al* at 2-3 (“*XO et al*”).

¹² *TWTC/One* at 13.

¹³ *Id.*

¹⁴ Comments of ATX Communications *et al*, Brownworth Declaration on behalf of DeltaCom at 2 (“*ATX et al*”).

- “It is Penn Telecom’s experience that the vast majority of the small and medium enterprise market [in the Pittsburgh Metro market] is reachable only by [using] Verizon facilities.”¹⁵

If the ILECs truly faced the competitive forces they claim they do, ***why are purchasers still buying the vast majority of their special access services from the ILECs?*** And, while the Bell Companies tout their use of alternative providers out-of-region, interestingly, AT&T and Verizon have not actually provided the *percentage* of their total out-of-region access spend they have been able to divert to unaffiliated (not legacy AT&T or MCI) non-incumbent access providers. Why too is it, as the GAO reported, “that prices and average revenues are higher, on average, in phase II MSAs – *where competition is theoretically more vigorous* – then they are in phase I MSAs or in areas where prices are still constrained by the price cap[?]”¹⁶ So, while the Bells identify providers they allege compete in their territories, they do not demonstrate that these providers have been able to win a significant portion of the special access market from the Bells.

It is inconceivable that competitive providers are just neglecting to market – or indeed “hide” – their services from buyers. Rather, as many parties explained in their comments, cable and fixed wireless are not viable substitutes.¹⁷ Moreover, with regard to competitive wireline providers, numerous commenters cite to the anticompetitive impact

¹⁵ *ATX et al*, Albaugh Declaration at 4.

¹⁶ Government Accountability Office, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Service*, Report 07-80, at 13 (Nov. 2006)(“*GAO Report*”) (emphasis added).

¹⁷ See *BT* at 8-10; *Sprint Nextel* at 32 [“[T]he announced FiberTower deal... *does not replace any existing special access services that Sprint Nextel obtains from incumbent LECs.*”]; and *TWTC/One* at 14-18.

of the Bells’ “optional pricing” plans – exclusionary pricing arrangements that “lock up” the purchasers’ demand - as making it infeasible for alternative providers to compete.¹⁸ As one carrier succinctly put it, “[t]hese types of contractual provisions are an ongoing barrier to facilities-based competitive entry because they foreclose competitors’ access to customers over the long term and distort entry decisions.”¹⁹ Now Verizon has even indicated its intent to expand its exclusionary pricing practices to reach nationwide.

As COMPTTEL explained in its initial round of supplemental comments, these “optional pricing” plans constitute anticompetitive behavior under the *Areeda* test. In their comments, the Bells fail to identify even “*one competing firm able to match the [incumbent's] discount across all product lines.*”²⁰ While they identify carriers they claim are present in their in-region territory, they do not even attempt to show that together these companies could cover the entire region encompassed by their “optional pricing” plans. But even assuming they could, such a showing still would not pass the *Areeda* test and, as AT&T (then SBC) explained as part of its “efficiency justification” in the SBC/AT&T merger proceeding, integrating multiple carriers, through contract, simply fails to allow the purchasing carrier to provide the same quality of service that can

¹⁸ See *PAETEC* at 12-15; *ATX et al* at 50-51; *TWTC/One* at 36-42; *Global Crossing* at 8-10; *Sprint Nextel* at 24-29; *XO et al* at 26-35; Comments of the New Jersey Division of Rate Counsel at 7; and *BT* at 10-11.

¹⁹ *PAETEC* at 13.

²⁰ 3 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, ¶ 749 (internal citation omitted)(“*Areeda*”).

be provided if one carrier were able to integrate multiple networks through acquisition.²¹

Thus, as COMPTTEL suggests, in addition to taking immediate action to bring prices more in line with prices that would result from a competitive market, the Commission needs to eliminate these anticompetitive “optional pricing” plans. If competitive providers have facilities ready to compete, as the ILECs claim, then pervasive price regulation should be short term once the anticompetitive pricing arrangements are eliminated.

As a final suggestion, COMPTTEL recommends that the Commission use Occam’s razor to shave away the Bell misrepresentations regarding the availability of special access substitutes, and issue one simple interrogatory (the answer to which is supported by appropriate documentation), requesting that Verizon Wireless provide the percent of its total out-of-region expense for special access circuits for the prior twelve month period (disaggregated, if possible, by loops, interoffice transmission, and entrance facilities) that has been diverted to non-affiliated, non-incumbent alternative access providers. Because Verizon Wireless owes a fiduciary duty to its minority shareholder, Vodafone, COMPTTEL believes the simplest, most objective, evidence of the availability of alternative access providers, and a carrier-customer’s ability to use these providers, will come from the answer to this question.

CONCLUSION

COMPTTEL respectfully requests that the FCC take responsibility for the current anticompetitive state of the special access markets and (1) immediately bring special access prices to levels more consistent with competitive markets, and (2) eliminate

²¹ Rice Declaration, SBC-AT&T Merger Application, WC Docket No. 05-65, at 2-7 (filed Feb. 22, 2005).

